No. 14-400

Title:	Charles E. Harris, III, Petitioner
	v.
	Mary K. Viegelahn, Chapter 13 Trustee
Docketed:	October 7, 2014
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(13-50374)
Decision Date:	July 7, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Oct 6 2014	Petition for a writ of certiorari filed. (Response due November 6, 2014)
Nov 6 2014	Brief of respondent Mary K. Viegelahn, Chapter 13 Trustee in opposition filed.
Nov 24 2014	Reply of petitioner Charles E. Harris, III filed.
Nov 25 2014	DISTRIBUTED for Conference of December 12, 2014.
Dec 12 2014	Petition GRANTED.
Jan 26 2015	Brief of petitioner Charles E. Harris, III filed.
Jan 26 2015	Joint appendix filed. (Statement of costs filed)
Feb 2 2015	SET FOR ARGUMENT ON Wednesday, April 1, 2015
Feb 2 2015	Brief amicus curiae of National Association of Consumer Bankruptcy Attorneys filed.
Feb 2 2015	Brief amicus curiae of G. Eric Brunstad, Jr. filed.
Feb 3 2015	Record requested from U.S.C.A. 5th Circuit.
Feb 3 2015	Record from U.S.C.A. 5th Circuit is electronic and located on PACER.
Feb 10 2015	Record received from U.S.D.C. Western District of Texas. (1 Envelope)
Feb 12 2015	CIRCULATED
Feb 25 2015	Brief of respondent Mary K. Viegelahn, Chapter 13 Trustee filed. (Distributed)
Mar 2 2015	Brief amicus curiae of National Association of Chapter Thirteen Trustees filed. (Distributed)
Mar 4 2015	Brief amici curiae of American Financial Services Association, et al., filed. (Distributed)
Mar 20 2015	Reply of petitioner Charles E. Harris, III filed. (Distributed)
Apr 1 2015	Argued. For petitioner: Matthew M. Madden, Washington, D. C. For respondent: Craig Goldblatt, Washington, D. C.
May 18 2015	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion for a unanimous Court.
Jun 19 2015	JUDGMENT ISSUED.

14-400

No.

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Chapter 13 of the Bankruptcy Code allows debtors to repay their creditors by turning a portion of their monthly income over to a Chapter 13 trustee for distribution to those creditors. At any time, however, a debtor may convert a Chapter 13 bankruptcy case to one under Chapter 7. Congress has provided that "[e]xcept" where the conversion is made in bad faith, the resulting Chapter 7 estate is limited to the debtor's property "as of the date" the original Chapter 13 petition was filed; it does not include wages or property that the debtor acquired *after* the petition date. 11 U.S.C. § 348(f).

The question presented is:

Whether, when a debtor in good faith converts a bankruptcy case to Chapter 7 after confirmation of a Chapter 13 plan, undistributed funds held by the Chapter 13 trustee are refunded to the debtor (as the Third Circuit held in *In re Michael*, 699 F.3d 305 (2012)) or distributed to creditors (as the Fifth Circuit held below).

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Admin. Office of the U.S. Courts, Table F-2, *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2014* 28, 29

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Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103 (2011) 28, 29

U.S. Dep't of Justice, Exec. Office for U.S. Trustees, *Handbook for Chapter 13 Standing Trustees* (Oct. 1, 2012) 30

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a–28a) is reported at 757 F.3d 468. The district court's decision (App., *infra*, 29a–49a) is reported at 491 B.R. 866. The bankruptcy court's opinion (App., *infra*, 50a–51a) is unreported.

JURISDICTION

The Fifth Circuit issued its decision on July 7, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In pertinent part, 11 U.S.C. § 1307(a) provides:

> The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time.

In pertinent part, 11 U.S.C. § 348 provides:

> (e) Conversion of a case under section 706, 1112, 1208, or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion.
>
> (f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the

possession of or is under the control of the debtor on the date of conversion;

* * * * *

(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.

11 U.S.C. § 1327(b) provides:

Except as otherwise provided in the plan or the order confirming the [chapter 13] plan, the confirmation of a plan vests all of the property of the estate in the debtor.

STATEMENT

This case presents an opportunity to resolve a recurring and important question of bankruptcy law that has "divided courts for thirty years" (App., *infra*, 2a) and on which two courts of appeals are now in acknowledged disagreement. This persistent division concerns whether a debtor is entitled to funds held by a trustee pursuant to a confirmed Chapter 13 plan when a debtor exercises his right to convert his bankruptcy case to a proceeding under Chapter 7. In the decision below, the Fifth Circuit required those funds to be distributed to petitioner's creditors (*id.* at 1a–28a); in contrast, the Third Circuit requires the return of such funds to the debtor (*In re Michael*, 699 F.3d 305 (2012)).

Under Chapter 7, creditors are paid out of the debtor's *pre-petition* assets (and *only* those assets). Under Chapter 13, by contrast, the debtor's estate

includes his *post-petition* income, which is most often what is used to pay his creditors. In exchange for a debtor's voluntary election to pay creditors in Chapter 13 out of his future income—funds that would be off-limits in a Chapter 7 proceeding—a Chapter 13 plan generally allows the debtor to continue to possess and use pre-petition assets that he might otherwise have to relinquish to creditors (such as a house or an automobile). "The Chapter 13 bankruptcy tends to be favored by debtors who have fallen behind on secured loan payments, such as mortgages and car loans, since it enables the debtor to maintain possession of the property while catching up on payments through a court-approved re-payment plan." App., *infra*, 36a.

A debtor has the right to convert his bankruptcy proceeding from Chapter 13 to Chapter 7 "[a]t any time during the Chapter 13 proceeding." App., *infra*, 37a (citing 11 U.S.C. § 1307(a)). "[C]onversion from Chapter 13 to Chapter 7," the Fifth Circuit recognized, "'necessarily ends the Chapter 13 case, which also terminates that Chapter 13 estate.'" *Id.* at 18a (quoting *In re Michael*, 699 F.3d at 313)). In the absence of a showing that the conversion was done in bad faith, the converted case "is effectively backdated to the date on which the Chapter 13 petition was filed" and the "'property of the estate'" in Chapter 7 is that which existed "'*as of the date of filing of the [Chapter 13] petition.*'" *Id.* at 37a (quoting 11 U.S.C. § 348(f)(1)(A)) (emphasis and alteration in original).

The Fifth Circuit held that, notwithstanding such a good-faith conversion, a Chapter 13 trustee should distribute any funds in its possession to creditors. The Third Circuit, in contrast, has held

that such funds should be refunded to the debtor. In short, a debtor's "fresh start" in bankruptcy is routinely thousands of dollars fresher in the Third Circuit (and many bankruptcy courts) than it is in the Fifth Circuit (and many other bankruptcy courts).

This Court's guidance is needed to resolve that split and to provide uniformity in the administration of the Nation's bankruptcy laws. The issue presented is undeniably recurring and important: Each year approximately 320,000 Chapter 13 proceedings are initiated, of which 60,000 are eventually converted to Chapter 7. See *infra* pages 29–30. At the same time, the monetary stakes are often too small, or the resources of debtors too meager, to justify not only litigating the issue in bankruptcy court but also pursuing multiple appeals to the district court and the court of appeals, thus ensuring that the issue has rarely been presented for this Court's review. This case is an excellent vehicle for resolving this pure question of law.

A. The Bankruptcy Court Proceedings

In early 2010, Petitioner Charles E. Harris, III, fell $3,700 behind on his home mortgage. App., *infra*, 3a. As a result, he filed for relief under Chapter 13 of the Bankruptcy Code. *Ibid.* Harris proposed a payment plan under which he would resume paying his mortgage, and his mortgage arrears and other debts would be repaid in full over 60 months out of $530 garnished from his wages each month by Respondent Mary K. Viegelahn, the Chapter 13 Trustee. *Id.* at 3a–4a. The bankruptcy court confirmed that plan in April 2010. *Id.* at 30a.

Petitioner was not able to keep his mortgage current. Accordingly, in November 2010 his mortgagor received (without opposition from petitioner) relief from the automatic bankruptcy stay to begin foreclosure proceedings on petitioner's home. App., *infra*, 4a. At that point, as required by petitioner's confirmed Chapter 13 plan, respondent stopped distributing $372 of petitioner's monthly wages to his mortgagor because the mortgagor had been granted leave to seek repayment of petitioner's mortgage arrears through foreclosure. *Ibid.*

Having failed to save his home, petitioner filed a notice converting his case to Chapter 7 in November 2011. Section 1307(a) of the Bankruptcy Code entities a Chapter 13 debtor to convert his case to Chapter 7 "at any time." Whereas Chapter 13 provides for creditors to be paid out of a portion of the debtor's future wages, Chapter 7 provides for repayment from the liquidation of property interests held by the debtor on the date he filed his original bankruptcy petition (subject to certain statutory exceptions). Compare 11 U.S.C. § 541 with *id.* § 1306. Any property the debtor acquired *after* his original petition date (including his post-petition wages) is not property of the Chapter 7 estate once the debtor has made a good-faith conversion. *Id.* § 348(f). A conversion to Chapter 7 also automatically "terminates the service" of the Chapter 13 trustee. *Id.* § 348(e). It is undisputed that petitioner's conversion to Chapter 7 was done in good faith.

At the time of petitioner's conversion, and after petitioner had assigned some funds to pay his attorneys' fees, respondent held $4,319.22 of petitioner's post-petition garnished wages. App.,

infra, 5a. Notwithstanding the conversion of petitioner's case to Chapter 7, respondent distributed those post-petition wages to petitioner's creditors, instead of returning them to petitioner. Petitioner moved to compel the refund of that money as having been distributed without authority.

The bankruptcy court granted petitioner's motion, ordering respondent to refund to petitioner the money she had distributed to creditors after petitioner's conversion to Chapter 7. Respondent appealed, and the bankruptcy court stayed its order upon respondent's posting of a $10,000 bond.[1]

B. The District Court's Decision

The district court affirmed the bankruptcy court's refund order. App., *infra*, 29a–49a. The court "agree[d] with the Third Circuit's reasoning" in *In re Michael*, 699 F.3d 305 (2012), that "the funds in question must be returned to the debtor." App., *infra*, 34a. The court acknowledged the deep division among bankruptcy courts on that issue, and found "more persuasive" the reasoning of those courts that had agreed with the bankruptcy court's position—

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[1] Petitioner's case thereafter proceeded under Chapter 7. With his home and mortgage out of the case, petitioner's only remaining assets were exempt from his estate under 11 U.S.C. § 522(b)(2). Accordingly, debtor's newly appointed Chapter 7 trustee reported to the court in December 2011 what had been true for months: Petitioner had "no property available for distribution from the estate over and above that exempted by law." On February 23, 2012, the bankruptcy court granted petitioner a discharge pursuant to Section 727 of the Bankruptcy Code.

"including, most recently, the Third Circuit." *Id.* at 43a

The district court reasoned that returning any undistributed funds to the debtor upon conversion was necessary to maximize a debtor's incentive to try to repay his creditors by proceeding under Chapter 13 in the first place. App., *infra*, 43a. The Bankruptcy Code, the court explained, implements a "Congressional policy of encouraging debtors to attempt a Chapter 13 bankruptcy—through which a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7." *Ibid.* Such a policy can be achieved only if the debtor can convert to Chapter 7 "without penalty if that attempt fails." *Ibid.*

In fact, the court explained, the rule urged by the trustee "would create" a powerful reason for debtors to *avoid* Chapter 13 altogether—"precisely the kind of disincentive to file a Chapter 13 bankruptcy that Congress was trying to avoid." App., *infra*, 47a. A debtor's post-petition wages, the court noted, are not included in a Chapter 7 estate, and a debtor who elects to proceed under Chapter 7 from the start puts those funds beyond the reach of his creditors. But a debtor who chooses to put those funds *within reach* of his creditors in order to attempt to make a Chapter 13 plan work should not be penalized by the loss of more of those funds to his creditors after such a plan has proven unworkable. A Chapter 13 trustee's *post-conversion* disbursement to creditors of a debtor's post-petition wages, the court held, is antithetical to that policy. *Id.* at 43a–45a; see also *id.* at 45a ("'If debtors must take the risk that property acquired during the course of an attempt at

repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished'" (quoting *In re Bobroff*, 766 F.2d 797, 803 (3d Cir. 1985)).

This case, the district court added, provides a telling illustration of the potential disincentives to using Chapter 13 that would arise if the funds in question were distributed to creditors rather than returned to the debtor:

> Here, Debtor attempted to repay his debts under Chapter 13, making payments under the confirmed plan for more than a year and a half. There is no dispute that the funds at issue would not have been part of the Chapter 7 estate if Debtor had filed a Chapter 7 petition originally; nor does the Trustee allege that Debtor converted to Chapter 7 in bad faith.

Id. at 47a–48a.

To whatever extent its holding might "incentivize bad-faith conversions" to "'game the system,'" the court stated that Section 348(f)(2) of Bankruptcy Code provided Congress's response. Under that provision, the result of a *bad-faith* conversion is that all debtor's property *on the date of conversion* (including any post-petition wages) is included in the "property of the estate" in the resulting Chapter 7 case. *Id.* at 47a. Indeed, the district court reasoned, Congress's answer to bad-faith conversions in Section 348(f)(2) "provides additional support for the idea that Congress would

want the disputed funds to be returned to [the] [d]ebtor" upon his good-faith conversion. *Ibid.*

Finally, the district court observed that there is "nothing unfair about returning [undistributed, post-petition wages] to a debtor rather than to his creditors." App., *infra*, 45a. During the pendency of the Chapter 13 case, creditors would already "'have had the benefit of distribution from debtors' wage contributions, which would not have been available to them under Chapter 7.'" *Id.* at 45a–46a (quoting *In re Boggs*, 137 B.R. 408, 410 (Bankr. W.D. Wash. 1992)). Given that creditors had already received value to which they were entitled only at the debtor's election, "'there seems no inherent inequity in refunding undisbursed wage contributions to debtors on conversion.'" *Id.* at 46a (same).

C. The Court of Appeals' Decision

Respondent appealed a second time, and the court of appeals reversed. The Fifth Circuit held that, notwithstanding petitioner's good-faith conversion to Chapter 7, his post-petition wages were appropriately distributed to his creditors under his Chapter 13 plan. The court of appeals recognized that this "question of law" is one that "has divided courts for thirty years." App., *infra*, 2a. In addition to the Third Circuit's contrary decision in *In re Michael*, the Fifth Circuit cited eight bankruptcy court "[o]pinions holding that the funds should be returned to the debtor," and twelve bankruptcy court "[o]pinions holding that the funds should be distributed to creditors." *Id.* at 2a n.1.

Unlike the Third Circuit, the Fifth Circuit found "little guidance in the Bankruptcy Code." App., *infra*,

22a. It turned instead "to considerations of equity and policy," and in doing so relied heavily on Judge Roth's dissent from the Third Circuit's *In re Michael* decision to conclude that such considerations favor creditors rather than debtors. See *id.* at 22a–28a.

Again acknowledging contrary decisions by the Third Circuit and numerous bankruptcy and district courts, the court of appeals concluded that, although "payments made under the plan do not give creditors any vested rights to payment, * * * the creditors' claim to the undistributed funds is superior to that of the debtor." App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals' Decision Conflicts With The Third Circuit And Deepens The Widespread Division Among Lower Courts

The court of appeals acknowledged that its decision conflicts with the Third Circuit's decision in *In re Michael*, 699 F.3d 305 (2012), and that this issue "has divided courts for thirty years." App., *infra*, 2a. This Court should grant the petition in order to resolve that longstanding dispute and settle this important and recurring question of bankruptcy law.

A. The Third Circuit, presented with nearly identical facts in a case two years ago, reached the opposite conclusion from that reached by the court of appeals below. The Third Circuit held that "undistributed plan payments held by a Chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith." *In re Michael*, 699 F.3d at 316.

In *Michael*, as here, the debtor's Chapter 13 plan required regular mortgage payments outside the plan and monthly wage garnishments from which the Chapter 13 trustee would pay debtor's mortgage arrears and unsecured consumer debt. 699 F.3d at 307. After confirmation of the plan, the debtor again fell behind on his mortgage. *Ibid.* His mortgagor received relief from the automatic bankruptcy stay to foreclose on debtor's home. *Ibid.* The trustee tried to continue sending debtor's mortgagor the same portion of the monthly wage garnishments as before, but the mortgagor refused those payments because of its relief from the stay and commencement of foreclosure proceedings. *Ibid.* Having been unable to salvage his home by proceeding in Chapter 13, the debtor converted his case to Chapter 7 more than three years later.

By that time, the Chapter 13 trustee had accumulated nearly ten thousand dollars in debtor's post-petition wages because of the distributions refused by the mortgagor. 699 F.3d at 307. Both the bankruptcy court and the district court ordered the Chapter 13 trustee to return any undistributed funds, post-conversion, to the debtor. *Id.* at 307–08. The Third Circuit affirmed. In a majority opinion by Judge Ambro, the court held that, although "the Code provide[s] no clear answer to this question," *id.* at 308, a number of its provisions compel the conclusion that Congress intended for undistributed funds to be returned to the debtor, *id.* at 308–10. As explained below, the Fifth Circuit in this case expressly disagreed with each step in the Third Circuit's analysis.

First, the Third Circuit pointed to Section 348(f). 699 F.3d at 308. Section 348(f) states that funds held by a Chapter 13 trustee when a debtor converts his case to Chapter 7 do not become property of the Chapter 7 estate unless the conversion is made in bad faith. 11 U.S.C. § 348(f). Although Section 348(f) does not "resolve explicitly" whether those funds get returned to the debtor or distributed to his creditors, the Third Circuit concluded that "§ 348(f)'s language and legislative history express Congress's preference as to what property belongs to a debtor after conversion, and ultimately direct our decision." 699 F.3d at 308–09; see also *id.* at 314 (explaining that the history of Section 348(f) "supports that Congress's intended outcome is that payments held by the Chapter 13 trustee revert to the debtor on conversion"). The court further reasoned that "§ 348(f)(2) logically requires that a debtor receive the property if he acts in good faith" by providing that "a debtor who converts in bad faith is not entitled to this post-petition property." *Ibid.*

According to the Fifth Circuit, however, the Third Circuit "fail[ed] to recognize that undistributed post-petition wages * * * constitute only a subset of the debtor's post-petition property." App., *infra*, 21a. Therefore, in the Fifth Circuit's view, "distributing the remaining payments held by the trustee at the time of conversion neither renders § 348(f)(2) superfluous nor removes the disincentive for bad faith in most cases." *Id.* at 22a.

Second, the Third Circuit in *Michael* examined Section 348(e) of the Bankruptcy Code, which "'terminates the service[]' of the Chapter 13 trustee" when a case is converted to Chapter 7. 699 F.3d at

310 (quoting 11 U.S.C. § 348(e)). Termination of the trustee's service upon conversion, Judge Ambro explained, "seemingly renders [the trustee] powerless to make payments to creditors under a Chapter 13 plan." *Ibid.* The trustee retains certain ancillary duties, post-conversion, "to account for the funds that came into his possession by filing a final report under Federal Rule of Bankruptcy Procedure 1019(5)(B)(ii)," *ibid.*, but those "limited duties" do not imply "that he is permitted to distribute funds under a plan that is no longer operative," *id.* at 314.

The Fifth Circuit, by contrast, thought that the Third Circuit had taken the language of Section 348(e) "'too literally.'" App., *infra*, 10a (quoting *In re Parrish*, 275 B.R. 424, 430 (Bankr. D.D.C. 2002)). "'[T]here is no logical reason,'" the court believed, "'why distribution of funds pursuant to the previously confirmed reorganization plan cannot be included" among the Chapter 13 trustee's post-conversion "administrative duties." App., *infra*, 11a (quoting *In re Michael*, 699 F.3d at 320 n.8 (Roth, J., dissenting)).

Finally, the Third Circuit construed Section 1327(b) of the Bankruptcy Code as requiring the undistributed wages to be returned to the debtor. Section 1327(b) provides that confirmation of a Chapter 13 plan "vests all of the property of the estate in the debtor" "[e]xcept as otherwise provided in the plan or the order confirming the plan." 11 U.S.C. § 1327(b). "The implication" of that directive, the Third Circuit concluded, "is that property held by the Chapter 13 Trustee after plan confirmation is 'under the control of the debtor as of the date of [a

later] conversion' for purposes of § 348(f)(1)." 699 F.3d at 310 (alteration in original).

The Third Circuit also noted that the Ninth Circuit had reached the same conclusion by relying on Section 1327(b)'s counterpart in Chapter 12 of the Bankruptcy Code (which applies to family farmers and fishermen). *Ibid.* (citing *Arkison* v. *Plata (In re Plata)*, 958 F.2d 918, 922 (9th Cir. 1992)). In *Plata*, the Ninth Circuit relied on cases construing Chapter 13 to hold that "postconfirmation funds held by the Chapter 12 trustee but remaining unpaid to creditors at the time the Chapter 12 case was converted to a Chapter 7 liquidation revested in Debtors at the time of the conversion." 958 F.2d at 922. Where nothing in the confirmed Chapter 12 plan "either required or even provided for the later payment by the trustee of any undisbursed funds to creditors in the event of a conversion to Chapter 7," a debtor's vested rights in the property of the estate at plan confirmation controlled. *Ibid.*[2]

Once again, the Fifth Circuit rejected this analysis, concluding that it "ignor[ed] the clear exception to this general rule" for actions required by the confirmed plan. App., *infra*, 19a. As the Fifth Circuit viewed the statute, when a Chapter 13 plan calls for funds to be collected and distributed by a

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[2] There is every reason to believe that the Ninth Circuit would reach the same conclusion with respect to a conversion from Chapter 13 to Chapter 7. At least one bankruptcy court in that Circuit has already concluded that *Plata* controls the same question under Chapter 13. *In re Horne*, No. 97-20171, 2002 WL 33939743, at *4 (Bankr. D. Idaho Jan. 10, 2002).

trustee, the plan excludes such funds from the "property of the estate" that "vests" "in the debtor." See *id.* at 18a–19a.

In addition to its statutory analysis, the Third Circuit concluded that policy considerations favor requiring Chapter 13 trustees to return undistributed funds to the debtor upon conversion. The Third Circuit sided with bankruptcy courts that have concluded there is "nothing 'unjust' in returning undistributed plan payments to a debtor." 699 F.3d at 312 (citing *In re Boggs*, 137 B.R. at 410). After all, the court explained, "creditors ultimately will receive as much, if not more, than they would have received if the debtor initially had filed under Chapter 7." *Ibid.* Moreover, returning undistributed funds to debtors "furthers Congress's preference that on conversion to Chapter 7 a Chapter 13 debtor receive all post-petition property that is held by the Chapter 13 trustee, but still is under the control of the debtor, so that debtors are encouraged to attempt to repay their debts through reorganization rather than liquidation." *Id.* at 316. A contrary rule, the Third Circuit emphasized, "would dissuade debtors from filing under Chapter 13" in the first place. *Id.* at 315.

In the Fifth Circuit's view, however, "[b]oth the district court in this case and the Third Circuit in *Michael*" placed too much weight on "a congressional policy of encouraging debtors to attempt repayment through Chapter 13 and removing disincentives that would discourage this." App., *infra*, 22a. A debtor would not be "meaningfully deterred" from pursuing reorganization under Chapter 13, the court posited, "by the knowledge that payments made under a confirmed Chapter 13 plan will not be returned to

him if he chooses to convert to Chapter 7." *Id.* at 24a. In that respect, the court agreed with Judge Roth's dissenting opinion in *Michael* that post-petition wages are different from other property the debtor acquires after filing a bankruptcy petition. *Id.* at 23a–26a. The Fifth Circuit likewise sided with Judge Roth in concluding that "strong considerations of fairness" supported post-conversion payments to creditors. *Id.* at 26a. In particular, it held that "'the attached wages are the *quid pro quo* that the debtor has given up during the pendency of the reorganization in return for being permitted to stave off foreclosure and cure the mortgage default * * * and enjoy the automatic stay.'" *Id.* at 26a–27a (quoting *In re Michael*, 699 F.3d at 319 (Roth, J., dissenting)).

In sum, the Third Circuit's decision in *Michael* is squarely at odds with the Fifth Circuit's decision below. The two Circuits addressed essentially identical facts, and their resulting decisions demonstrate a sharp disagreement over what both the Bankruptcy Code and Congressional bankruptcy policy require. Each Circuit fully developed its view of the law in a careful opinion, and future decisions by other courts of appeals will likely just fall in behind one or the other side in this debate. There is no reason to believe this split among the circuits will resolve itself, and every reason to believe it will continue to deepen.

B. As the court of appeals recognized below, its acknowledged disagreement with the Third Circuit reflects a contested legal issue that "has divided courts for thirty years." App., *infra*, 2a. And so it has. On at least ten occasions, a bankruptcy court, district court, or bankruptcy appellate panel has held

(like the Third Circuit in *Michael*) that undistributed funds held by a Chapter 13 trustee should be refunded to the debtor upon conversion.[3] By contrast, on at least fifteen occasions, a bankruptcy court has held (like the court of appeals below) that such funds should be distributed to creditors.[4] These 25

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[3] *In re Murphy*, Nos. 09-81861, 12-30813, 2014 WL 2600168, at *2–*3 (Bankr. M.D. Ala. Feb. 11, 2014); *Gallagher* v. *Dockery (In re Gallagher)*, No. CC-13-1368-TaKuPa, 2014 WL 998411, at *6 (B.A.P. 9th Cir. Mar. 17, 2014); *In re Krahenbuhl*, No. 09-29618-svk, 2013 WL 3793405, at *2 (Bank. E.D. Wisc. July 19, 2013); *In re Harris*, App., *infra*, 29a–49a; *In re Harris*, App., *infra*, 50a–51a; *In re Horne*, No. 97-20171, 2002 WL 33939743, at *4 (Bankr. D. Idaho Jan. 10, 2002); *DeHart* v. *Michael (In re Michael) ("Michael II")*, 446 B.R. 665, 667 (M.D. Pa. 2011); *In re Michael ("Michael I")*, 436 B.R. 323, 331 (Bankr. M.D. Pa. 2010); *In re Boggs*, 137 B.R. 408, 410–11 (Bankr. W.D. Wash. 1992); *In re Bullock*, 41 B.R. 637, 638–41 (Bankr. E.D. Pa 1984).

[4] *In re Smith*, 511 B.R. 612, 620–21 (Bankr. W.D. Mo. 2014); *In re Markham*, 504 B.R. 1, 8 (Bankr. D. Mass. 2013); *Spero* v. *Porreco (In re Porreco)*, 426 B.R. 529, 537 (Bankr. W.D. Pa. 2010) (overruled by *In re Michael*); *Chase* v. *Winnecour (In re Chase)*, No. 03-10092, 2008 WL 2309529, at *1 (Bankr. W.D. Pa. June 4, 2008) (overruled by *In re Michael*); *In re Pegues*, 266 B.R. 328, 334 (Bankr. D. Md. 2001); *In re Salisbury*, No. 99-10431C-7G, 2000 WL 33673758, at *2 (Bankr. M.D.N.C. Nov. 17, 2000); *In re Bell*, 248 B.R. 236, 239–40 (Bankr. W.D.N.Y. 2000); *In re Hardin*, 200 B.R. 312, 314 (Bankr. E.D. Ky. 1996); *O'Quinn* v. *Brewer (In re O'Quinn)*, 143 B.R. 408, 413 (Bankr. S.D. Miss. 1992); *In re Galloway*, 134 B.R. 602, 602–04 (Bankr. W.D. Ky. 1991); *In re Halpenny*, 125 B.R. 814, 815–16 (Bankr. D. Haw. 1991); *In re Milledge*, 94 B.R. 218, 219–20 (Bankr. M.D. Ga. 1988); *Ledford* v. *Burns (In re Burns)*, 90 B.R. 301, 305 (Bankr. S.D. Ohio 1988); *Waugh* v. *Saldamarco (In re Waugh)*, 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988) (overruled by

decisions, moreover, are just those in which a bankruptcy or district judge entered a written opinion on the question presented in this case; it stands to reason that the same issue has been determined on the record or by unadorned order countless times more.

This three-decade-old division is also deepening with time. In just the two years since *Michael*, the Ninth Circuit's bankruptcy appellate panel and bankruptcy courts in Alabama and Wisconsin have adopted the Third Circuit's approach (see *supra* note 3 (citing cases)), but bankruptcy courts in Missouri and Massachusetts have adopted the approach taken by the Fifth Circuit below (see *supra* note 4 (citing cases)).

Each of these conflicting decisions resolved the fate of funds meaningfully important to an individual debtor seeking a "fresh start" out of bankruptcy. Yet these sums of money—in the thousands or tens or thousands of dollars—are often not enough to justify a debtor's expenditure of limited resources to pursue one or multiple appeals. Perhaps for that reason, there have not been a large number of decisions on this issue by the Circuits. This case therefore provides this Court a somewhat rare opportunity to address and resolve a recurring question of bankruptcy law that is of tremendous practical importance and has caused problems for the bankruptcy and district courts for three decades.

In re Michael); *In re Redick*, 81 B.R. 881, 887 (Bankr. E.D. Mich. 1987).

II. The Decision Below Is Erroneous

As the Third Circuit correctly held in *Michael*, the Bankruptcy Code points—more than once—toward a requirement that Chapter 13 trustees return undistributed payments to a debtor upon conversion to Chapter 7. Such a rule is also consistent with the policy choices Congress expressed in those Code provisions by providing incentives for debtors to attempt Chapter 13 reorganizations.

A. Numerous provisions of the Bankruptcy Code show that Congress intended for Chapter 13 trustees to return undistributed funds to the debtor upon conversion to Chapter 7.

1. Returning undistributed funds to the debtor upon conversion follows from the text of Section 348, which governs the effect of conversion from Chapter 13 to Chapter 7. Two subsections of Section 348 provide debtors the ability to make a clean break with their Chapter 13 proceeding without any penalty.

Section 348(f) states that, "[e]xcept" when a debtor has acted bad faith, the post-conversion Chapter 7 estate comprises only the debtor's *petition-date* property, and none of the *post-petition* property (including wages) that was in the Chapter 13 estate. Until 1994, the Circuits were split over whether funds held by the Chapter 13 trustee at conversion became part of the Chapter 7 estate (with those courts answering "no" in turn split over whether the debtor or his creditors get them). App., *infra*, 5a–6a. "In 1994, Congress resolved the circuit split by enacting 11 U.S.C. § 348(f)." *Id.* at 6a. In adopting Section 348(f), therefore, Congress considered *but*

rejected making a debtor's undistributed, post-petition wages and other property available to his creditors after conversion through the resulting Chapter 7 estate. As a House Report accompanying the amendment stated, Congress's intent was to avoid the "serious disincentive" to attempting a Chapter 13 reorganization if a Chapter 7 estate included debtor's post-petition property *only in a converted case*. See *id.* at 7a–9a (quoting H.R. Rep. No. 103-835, at 57 (1994)).

In short, the Chapter 13 estate that includes debtors' post-petition wages terminates upon conversion, and the resulting Chapter 7 estate does not include those wages. It would be passing strange to think that Congress intended to permit an end-run around the legislative choice embodied in Section 348(f) by which funds that were *not* to be included in the Chapter 7 estate would nonetheless find their way to creditors. There is simply no statutory authority for the distribution to creditors of funds that are no longer the property of *any* estate.

What is more, to prevent debtors from taking advantage of this feature of the bankruptcy process, Congress provided that the Chapter 7 estate *would* retain a debtor's post-petition property if the debtor had converted his case *in bad faith*. 11 U.S.C. § 348(f)(2). That limited "except[ion]" built into the text of Section 348(f) necessarily indicates that debtors who convert their cases *in good faith* will *retain* all of their post-petition property (including undistributed post-petition wages). See *In re Michael*, 699 F.3d at 314.

The Fifth Circuit below sought to side-step that inference by noting that "undistributed post-petition

wages" are "only a subset of the debtor's post-petition property" to which the bad-faith exception applies. App., *infra*, 21a. Accordingly, the court believed, its holding would not render Congress's penalty for bad-faith conversion "superfluous." *Id.* at 21a–22a. Superfluity is not the issue, however. The point is that a debtor's post-petition wages are *among* the property that Congress intended debtors to keep upon a good-faith conversion to Chapter 7, but to lose to the Chapter 7 estate upon a bad-faith conversion. It is no answer to say, as the court of appeals did, that *most* of Congress's intent is unaffected by carving out only *part* of what it intended.

2. Moreover, Section 348(e) provides that conversion "terminates the service" of the Chapter 13 trustee. 11 U.S.C. § 348(e). That provision, as the Third Circuit concluded, incapacitates the trustee from continuing to distribute the property of the former Chapter 13 estate to creditors. See *In re Michael*, 699 F.3d at 310 (holding that Section 348(e) "seemingly renders [the trustee] powerless to make payments to creditors under a Chapter 13 plan" after conversion).

The Fifth Circuit thought that the Third Circuit had taken the language of Section 348(e) "'too literally.'" App., *infra*, 10a (quoting *In re Parrish*, 275 B.R. at 430). "'[T]here is no logical reason,'" the court believed, "'why distribution of funds pursuant to the previously confirmed reorganization plan cannot be included" among the Chapter 13 Trustee's post-conversion "administrative duties." App., *infra*, 11a (quoting *In re Michael*, 699 F.3d at 320 n.8 (Roth, J., dissenting)). Yet the ancillary "administrative duties" a Chapter 13 trustee has after conversion—

principally to account for the former Chapter 13 estate in a final report—is not the "service" that Section 348(e) is intended to "terminate[]." It is the trustee's role as the debtor's disbursing agent—collecting funds from the debtor and distributing those funds to creditors—that is meant to cease upon conversion. Restoring to a debtor any garnished wages that were not distributed while the trustee was still performing that "service" is a mere administrative duty in a way that continuing to parcel out those funds to creditors is not.

3. Section 1327(b) states that confirmation of a Chapter 13 plan "vests all of the property of the estate in the debtor" "[e]xcept as otherwise provided in the plan or the order confirming the plan." 11 U.S.C. § 1327(b). That "property of the estate" undoubtedly includes debtor's post-petition wages. 11 U.S.C. § 1306(a)(2). Whether such funds are held by the Chapter 13 trustee or by the debtor, they are property of the estate, vested in the debtor, unless and until those funds are distributed to creditors. Indeed, the court of appeals recognized that creditors lack any vested interest in such funds until they receive them. App., *infra*, 14a–18a (rejecting respondent's contrary argument).

When a Chapter 13 case is converted after plan confirmation, however, the Chapter 13 estate ceases to exist. The former "property of the estate" that was vested in the debtor upon plan confirmation (§ 1327(b)) *remains* vested in the debtor, and it must be returned to the debtor under settled principles of property law.

In holding otherwise, the court of appeals focused on Section 1327(b)'s caveat for contrary

vesting rights established by the confirmed plan or confirmation order. App., *infra*, 19a–20a. The court concluded that petitioner's Chapter 13 plan, by providing for monthly payments to respondent, had extinguished petitioner's vested interest in those funds. "[T]he debtor certainly does not retain possession of these payments," the court stated, and so "it would seem that the confirmation order specifically divests the debtor of any interest he may have in the payments made to the trustee." *Id.* at 20a. Not so. Prior to conversion, funds held by the debtor or by the trustee were in either case "property of the estate"; the presumption in Chapter 13 is that the debtor will *possess* the property of the estate, but the plan may direct otherwise. See 11 U.S.C. § 1306(b). As the Third Circuit held in *Michael*, the fact that some property of the estate is held by the trustee has no bearing on debtor's vested interest in all of that property. 699 F.3d at 313; see also *In re Plata*, 958 F.2d at 922 (reaching the same conclusion under Chapter 12's corresponding provision for bankrupt family farmers and family fishermen, 11 U.S.C. § 1227(b)).

Such a reading of Section 1327(b) is consistent with other provisions of the Bankruptcy Code that require the trustee to return funds to the debtor under other circumstances. See *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction * * * is a holistic endeavor."). If a Chapter 13 plan is not confirmed, Section 1326(a)(2) requires that any funds the debtor has already paid to the trustee be restored to the debtor. Likewise, if a Chapter 13 case is dismissed, Section 349(b)(3) requires funds held by the trustee to be returned to the debtor. Creating a

different rule for conversions is nonsensical. If petitioner had moved to dismiss his Chapter 13 case instead of converting it, there is no dispute that respondent would have refunded any undistributed funds to him under Section 349(b)(3). There is "no justification for requiring a debtor to dismiss, rather than convert * * * in order to preserve" certain benefits, and any contrary requirement "creat[es] a trap for the unwary," "elevate[s] form over substance," and "inject[s] a needless degree of extra work on the part of all concerned." *In re Plata*, 958 F.2d at 922; see also *In re Michael*, 699 F.3d at 313–14 n.6.

B. After erroneously concluding that there is "little guidance in the Bankruptcy Code" bearing on this question, the court of appeals "turn[ed] to considerations of equity and policy" to fill the perceived gap. App., *infra*, 22a. In doing so, the court understated the disincentives its rule creates for debtors who are contemplating reorganization under Chapter 13, and overstated the "strong considerations of fairness" it perceived as demanding post-conversion distributions to creditors. *Id.* at 26a.

1. The decision below produces a significant disincentive against a debtor *continuing* to proceed in Chapter 13 after a change in circumstances. In this case, for example, petitioner's mortgagor received relief from the stay, and the trustee began to withhold the portion of petitioner's garnished wages that his Chapter 13 plan directed to that mortgagor. App., *infra*, 4a–5a. For a year thereafter, however, petitioner continued to make a go of his Chapter 13 plan. As a result, $158 of his monthly wages kept flowing to his other creditors.

This was an unmitigated benefit to those creditors. If petitioner had converted to Chapter 7 immediately when his mortgagor received relief from the stay, those payments never would have been made. Petitioner's modest assets (after losing his home) were exempt from a Chapter 7 liquidation, see *supra* note 1, so his creditors stood to receive nothing from the estate once he converted his case. He kept paying them anyway. But if petitioner had known that, by delaying conversion and continuing in Chapter 13, his other creditors would also end up obtaining the withheld funds his plan intended for his mortgagor, petitioner's most rational choice would have been to abandon Chapter 13 (and his creditors) at the first available opportunity.

The court of appeals' decision also provides a disincentive to attempting a repayment plan under Chapter 13 in the first place. From the debtor's perspective, one of the most significant differences between Chapter 13 and Chapter 7 is that in Chapter 13—but not Chapter 7—wages and property the debtor acquires *after* the petition date become "property of the estate." Compare 11 U.S.C. § 1306 (Chapter 13) with *id.* § 541 (Chapter 7). That provides a benefit to a debtor, who can repay his creditors out of his future income and stave off the liquidation of his house, car, and other assets to pay those debts. The debtor must feel confident, however, that if those goals are not met—*e.g.*, the car or the home is lost to creditors—that he can turn off the spigot of payments out of his post-petition income by converting his case to Chapter 7. Any risk that creditors will get "bonus" payments out of his post-petition wages *despite* such a conversion increases

the risks associated with proceeding in Chapter 13 in the first place.

Indeed, if the result below were to hold, petitioner's case will be a cautionary tale for any individual debtor contemplating Chapter 13. If petitioner had proceeded under Chapter 7 from the start, his home would have been liquidated to pay his mortgagor. Petitioner, after having surrendered his car, had no other assets that were not exempt from the Chapter 7 estate under Section § 522(b) of the Bankruptcy Code. See *supra* note 1. Accordingly, petitioner would have received a discharge of his other debts in Chapter 7 without any other asset sales or payments. His post-petition wages would have been his and his alone.

2. The court of appeals was also wrong to conclude that the "distribution of the funds to creditors is supported by strong considerations of fairness." App., *infra*, 26a.

The court relied on Judge Roth's dissent from the Third Circuit's decision in *Michael*, along with a handful of bankruptcy court decisions containing similar reasoning, to hold that it would be unfair to creditors if the Chapter 13 trustee returned payments to the debtor upon conversion to Chapter 7. See App., *infra*, 26a–28a. Those funds, the argument goes, were the debtor's "'*quid pro quo*'" for the benefits he had received during the Chapter 13 case—*i.e.*, "stav[ing] off foreclosure and cur[ing] the mortgage default." *Id.* at 26a (quoting *In re Michael*, 699 F.3d at 319 (Roth, J., dissenting)). That "'arrangement,'" the court stated, is not "retroactively alter[ed]" by conversion. *Id.* at 27a (quoting *In re Michael*, 699 F.3d at 320 n.8 (Roth, J.,

dissenting)). Nor does conversion, according to the Fifth Circuit, "undo the disadvantages that creditors may have suffered as a result of the [Chapter 13] plan." *Id.* at 27a.

That is exactly backwards. Many debtors, including petitioner, convert their cases from Chapter 13 to Chapter 7 because the former's "benefits" have proven illusory. When petitioner converted his case—just as when the debtor in *Michael* converted his—petitioner had already lost his home. App., *infra*, 4a; see also 699 F.3d at 307. In both cases, the funds the Chapter 13 trustee held at conversion had been garnished from the debtors' wages *after* each debtor had failed to "'stave off foreclosure and cure the mortgage default.'" App., *infra*, 26a (quoting *In re Michael*, 699 F.3d at 319 (Roth, J., dissenting)). The creditors to which the Chapter 13 trustee ultimately distributed those funds after conversion had not expected to receive such payments from the estate so early in the Chapter 13 plan's term. As to those creditors, the funds held by the trustee had not been the *quid pro quo* for anything.

Moreover, when petitioner filed for bankruptcy protection, his only non-exempt asset was his home.[5] If petitioner had filed his case under Chapter 7 from the start, then his home would have been sold, his mortgagor would have received the proceeds, and the rest of his debts would have been discharged to the

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[5] Petitioner also had possession of an automobile, but he surrendered that car, on or around the petition date, to the secured lender on his car loan. App., *infra*, 27a n.12.

extent authorized by law. It was petitioner's election to proceed under Chapter 13 in an attempt to save his home that provided his other creditors any opportunity to recover anything at all. Under the circumstances, it is hard to see why those creditors are entitled to receive additional post-conversion payments out of petitioner's post-petition wages as a matter of equity. Quite the contrary; fairness demands that petitioner "not lose those earnings on conversion." *In re Michael*, 699 F.3d at 315.

III. The Issue Is Recurring And Important To The Administration Of Chapter 13

The question presented is an important issue of bankruptcy law that affects many individual debtors each year who typically cannot afford to litigate this long-disputed legal issue.

During the twelve-month period ending June 30, 2014, debtors filed 321,278 Chapter 13 cases.[6] Approximately two-thirds of Chapter 13 cases end in dismissal or conversion rather than a discharge of debts. Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103, 108 (2011). For those Chapter 13 cases that do not end in a discharge, about 26% of them are

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[6] Admin. Office of the U.S. Courts, Table F-2, *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2014*, at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0614_f2.pdf ("6/30/14 Bankruptcy Statistics").

converted to Chapter 7. *Id.* at 112. Thus, roughly 60,000 Chapter 13 bankruptcy cases are converted to Chapter 7 each year. That suggests that, in the Third and Fifth Circuits alone, there are roughly 10,000 of these conversions annually. See 6/30/14 Bankruptcy Statistics at 1–2 (reporting 17,216 Chapter 13 petitions in the Third Circuit and 39,020 in the Fifth Circuit).

When many of these conversions occur, the trustee holds payments that had been made by the debtor under the Chapter 13 plan. Although Section 1326(a)(2) instructs trustees to distribute funds in their possession to creditors "as soon as is practicable," trustees cannot do so instantaneously. Generally, distributions are made monthly or biweekly. See *In re Michael*, 699 F.3d at 316. There is every reason to believe, moreover, that there are a significant number of cases like this one, and *Michael*, in which relief from the stay by a secured home or auto lender has caused the Chapter 13 trustee to retain more than just the prior wage garnishment.

Until this Court settles the issue, debtors and trustees alike are forced to navigate the uncertainty. The Department of Justice's *Handbook for Chapter 13 Standing Trustees* candidly advises Chapter 13 trustees that

> [i]f [a Chapter 13] case is * * * converted post-confirmation, the standing trustee must distribute any funds on hand in accordance with controlling law of the jurisdiction. Courts are divided on the issue of the disposition of funds if the case is converted to chapter 7. The standing trustee must follow legal authority in the

> jurisdiction, or seek a court order regarding disposition of the funds.

U.S. Dep't of Justice, Exec. Office for U.S. Trustees, *Handbook for Chapter 13 Standing Trustees* 3-36 (Oct. 1, 2012) (internal citation omitted).

Three decades of litigation to determine the "legal authority" in each "jurisdiction" has already sapped scarce resources. Debtors, in particular, are burdened enough as it is without being saddled with the legal expense of figuring out whether a particular bankruptcy judge will adhere to the Third Circuit's view or the Fifth Circuit's. Debtors converting from a Chapter 13 repayment plan to a Chapter 7 liquidation often do so because they are eager to hasten their fresh start out of bankruptcy. The average Chapter 13 proceeding lasts three to five years; the average Chapter 7 proceeding takes roughly four months. Porter, *supra*, at 108, 116–17. In this context, certainty is important. To make rational decisions as intended by the Bankruptcy Code, a debtor contemplating conversion needs to know what funds will be restored to him and what funds will not.

Today, however, the disposition of what often amounts to a petitioner's sole remaining assets turns on the Circuit—or even just the bankruptcy court—in which a debtor finds himself. This Court should grant the petition to provide certainty to debtors and ensure "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. 1, § 8, cl. 4.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-50374

In the Matter of: CHARLES E. HARRIS, III,

Debtor

MARY K. VIEGELAHN, Chapter 13 Trustee,

Appellant

v.

CHARLES E. HARRIS, III,

Appellee

Appeal from the United States District Court
for the Western District of Texas

Before BENAVIDES, CLEMENT, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

Charles Harris filed a bankruptcy petition under Chapter 13, made regular payments from his

wages to the trustee under a confirmed Chapter 13 plan, and eventually converted his case to Chapter 7. The district court held that payment funds in the possession of the Chapter 13 trustee that had not been distributed to creditors at the time of conversion must be returned to Harris. This appeal filed by the trustee presents a single question of law: should the undistributed payments held by the Chapter 13 trustee at the time of conversion be returned to the debtor or distributed to creditors pursuant to the Chapter 13 plan? This question has divided courts for thirty years,[1] although only one appellate court

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[1] Opinions holding that the funds should be distributed to creditors include *In re Pegues*, 266 B.R. 328 (Bankr. D. Md. 2001); *In re Bell*, 248 B.R. 236 (Bankr. W.D.N.Y. 2000); *In re Hardin*, 200 B.R. 312 (Bankr. E.D. Ky. 1996); *In re O'Quinn*, 143 B.R. 408 (Bankr. S.D. Miss. 1992); *In re Galloway*, 134 B.R. 602 (Bankr. W.D. Ky. 1991); *In re Halpenny*, 125 B.R. 814 (Bankr. D. Haw. 1991); *In re Milledge*, 94 B.R. 218 (Bankr. M.D. Ga. 1988); *Matter of Burns*, 90 B.R. 301 (Bankr. S.D. Ohio 1988); *In re Waugh*, 82 B.R. 394 (Bankr. W.D. Pa. 1988); *In re Redick*, 81 B.R. 881 (Bankr. E.D. Mich. 1987); *In re Rutenbeck*, 78 B.R. 912 (Bankr. E.D. Wis. 1987); and *In re Lennon*, 65 B.R. 130 (Bankr. N.D. Ga. 1986) (dicta).

Opinions holding that the funds should be returned to the debtor include *In re Michael*, 436 B.R. 323 (Bankr. M.D. Pa. 2010) ("*Michael I*"); *In re Boggs*, 137 B.R. 408 (Bankr. W.D. Wash. 1992); *In re de Vos*, 76 B.R. 157 (N.D. Cal. 1987); *In re Luna*, 73 B.R. 999 (N.D. Ill. 1987); *In re Peters*, 44 B.R. 68 (Bankr. M.D. Tenn. 1984); *In re Bullock*, 41 B.R. 637 (Bankr. E.D. Pa. 1984); *In re McFadden*, 37 B.R. 520 (Bankr. M.D. Pa. 1984); and *In re Hannan*, 24 B.R. 691 (Bankr. E.D.N.Y. 1982). However, many of the earlier opinions in the latter category, after determining that the funds do not become part of the new Chapter 7 estate, did not go on to consider whether creditors may nonetheless be entitled to them under the old Chapter 13 plan.

has squarely answered it.[2] For the reasons explained below, we hold that the payments must be distributed to creditors. Accordingly, we REVERSE the district court's order and REMAND the case to the district court.

BACKGROUND

In February 2010, Charles E. Harris, III, filed a petition for relief under Chapter 13 of the Bankruptcy Code. At the time of filing, he was $3,700 behind on his home mortgage loan, which was held by Chase. His proposed Chapter 13 plan was confirmed in April 2010. The plan called for Harris to make monthly payments of $530 to the trustee, Mary K. Viegelahn, out of his gross monthly income of $4,082.87, for 60 months. From each payment, $352 was to go to Chase to pay off the arrears on his

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[2] *In re Michael*, 699 F.3d 305 (3rd Cir. 2012) ("*Michael II*") (holding that the undistributed funds must be returned to the debtor). Other circuits have addressed similar questions. *See, e.g.*, *In re Stamm*, 222 F.3d 216 (5th Cir. 2000) (holding that when a Chapter 13 case is converted to Chapter 7 *before confirmation of a plan*, wages paid by the debtor to the trustee under the proposed plan do not become part of the Chapter 7 estate and must be returned to the debtor); *In re Young*, 66 F.3d 376 (1st Cir. 1995) (holding that earnings paid to a Chapter 13 trustee pursuant to a confirmed plan do not become part of the Chapter 7 estate upon conversion, without analyzing what should be done with these funds); *In re Nash*, 765 F.2d 1410 (9th Cir. 1985) (holding that any undistributed earnings paid to a Chapter 13 trustee pursuant to a confirmed plan must be returned to the debtor upon *dismissal* of the Chapter 13 case).

mortgage and approximately $75 was to go to Conns, the only other secured creditor, to repay a $900 debt on a television. After these debts and the debts to Harris' lawyer were paid off, the payments would go to Harris' unsecured creditors, who had claims against him for $20,458. The plan also called for Harris to make monthly mortgage payments of $960 directly to Chase.

In October 2010, Chase moved to lift the automatic stay with respect to Harris' home, stating that Harris had failed to make mortgage payments as required by the plan. The stay was lifted in November 2010. Harris then moved out of his house, and it was presumably foreclosed upon. Harris kept making monthly payments of $530 to Viegelahn for approximately a year before converting to Chapter 7 and did not attempt to modify the plan. However, after the automatic stay was lifted, Viegelahn placed a hold on the portion of the monthly payments intended to go to Chase. As a result, the funds in Viegelahn's possession began to accumulate.

Harris voluntarily converted his bankruptcy case to Chapter 7 on November 22, 2011. At that time, $5,519.22 remained in Viegelahn's possession. Attached to Harris' notice of conversion was an assignment of funds assigning $1,200 of the remaining funds to Harris' counsel in payment for legal fees. Viegelahn paid $1,200 to Harris' counsel on November 22, 2011. On December 1, 2011, Viegelahn distributed the remaining $4,319.22 as follows: $397.68 to Conns; $3,583.78 to six unsecured creditors; and $267.79 to herself as commission. Finally, on December 5, 2011, Viegelahn filed the

final report and account for the Chapter 13 case.

Harris moved to compel the return of the $4,319.22 that Viegelahn had distributed to his creditors, arguing that she had no authority to disburse funds after conversion of the case. After a hearing, the bankruptcy court issued an order compelling the return of the funds. Viegelahn appealed to the district court, and the district court affirmed the bankruptcy court's order. Viegelahn now appeals to this court.

DISCUSSION

I. Conversion From Chapter 13 to Chapter 7

The filing of a Chapter 7 petition creates an estate that comprises, with certain exceptions, all of the debtor's property at the time of filing. 11 U.S.C. § 541. Property acquired after the date of filing is generally not included in the estate. *See* 11 U.S.C. § 541(a). The estate is then liquidated to pay creditors and any remaining debt is, with certain exceptions, discharged. On the other hand, a Chapter 13 filing proposes a plan to pay creditors with future income rather than liquidation of existing assets. *See* 11 U.S.C. § 1322. Accordingly, the Chapter 13 estate includes, in addition to property held at the time of filing, any property or earnings acquired after filing but before the case is closed, dismissed, or converted. 11 U.S.C. § 1306(a).

A debtor who is unwilling or unable to continue paying creditors under a Chapter 13 plan may convert his case to a Chapter 7 liquidation at any time. 11 U.S.C. § 1307(a). Because of the differences

between a Chapter 13 estate and a Chapter 7 estate, such a conversion raises an inevitable question: does the Chapter 7 estate include all property held by the debtor at the time of conversion, or does it include only the property held at the time of the original Chapter 13 filing? Before 1994, there was a circuit split on this question.

In *In re Bobroff*, 766 F.2d 797, 803 (3rd Cir. 1985), the Third Circuit held that a tort action that had accrued while a debtor was proceeding under Chapter 13 would not become part of the estate upon conversion to Chapter 7. The court noted "the Bankruptcy Code's goal of encouraging the use of debt repayment plans rather than liquidation," and explained that "[i]f debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished." *Id.* On the other hand, in *Matter of Lybrook*, 951 F.2d 136, 137-38 (7th Cir. 1991), the Seventh Circuit held that farm land worth $70,000 that the debtor had inherited while proceeding under Chapter 13 would be included in the Chapter 7 estate upon conversion. The court held that "the Chapter 13 estate passes unaltered into Chapter 7 upon conversion," explaining that "a rule of once in, always in is necessary to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors." *Id.*

In 1994, Congress resolved the circuit split by enacting 11 U.S.C. § 348(f), which provides that

> when a case under chapter 13 . . . is converted to a case under another chapter . . . property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.

Id. at § 348(f)(1). On the other hand, "[i]f the debtor converts a case under chapter 13 . . . to a case under another chapter . . . in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion." *Id.* at § 348(f)(2). The House Report accompanying the act explains the purpose of the amendment:

> This amendment would clarify the Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 (and chapter 12), any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate do not apply to chapter 7. Other courts have held that property of the estate in a converted

case is the property the debtor had when the original chapter 13 petition was filed.

These latter courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.

This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion

> shall constitute property of the estate in the converted case.

H.R. Rep. No. 103-835, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366.

After the passage of § 348(f), it is clear that property acquired after the filing of a Chapter 13 petition, including wages, does not become part of the Chapter 7 estate upon conversion (absent bad faith). Specifically, this means that any funds paid by the debtor to the trustee pursuant to the Chapter 13 plan that have not been distributed at the time of conversion are not transferred to the Chapter 7 estate. However, no statute explicitly states what should happen to these funds. Harris argues that the funds should be returned to him, whereas Viegelahn argues that the funds should be distributed to creditors pursuant to the Chapter 13 plan.

II. Statutory Arguments

Harris relies upon our opinion in *Stamm* for the proposition that all post-petition wages belong to the debtor upon conversion from Chapter 13 to Chapter 7. However, the holding of *Stamm* is more limited – we held that when a Chapter 13 case is converted *before a plan is confirmed*, wages paid to the Chapter 13 trustee "are not part of the Chapter 7 estate, and must be returned to the Debtors." *Stamm*, 222 F.3d at 217. This is consistent with the Bankruptcy Code, which explicitly states that if a plan is not confirmed, any payments made under a proposed Chapter 13 plan must be returned to the debtor (after certain deductions are made). 11 U.S.C. § 1362(a)(2). However, there is no analogous

provision requiring that undistributed payments made pursuant to a confirmed Chapter 13 plan be returned to the debtor. Accordingly, *Stamm* is not controlling here.

Relying on 11 U.S.C. § 348(e), Harris argues that "the Trustee has no authority to disburse funds after her services are terminated." Section 348(e) provides that "[c]onversion of a case . . . terminates the service of any trustee or examiner that is serving in the case before such conversion." However, Harris' argument is obviously not intended to be taken at face value; if the trustee has "no authority to disburse funds," she would be unable to return the funds to Harris as he requests. To the extent that she is still holding funds belonging to someone else, she is plainly a trustee in some real sense, even if her services have been "terminated." *See Redick*, 81 B.R. at 886 ("Even if the Chapter 13 trustee no longer has that title, and no longer has the absolute duty to distribute the funds to the creditors pursuant to the confirmed Chapter 13 plan because the order confirming the plan and the plan have disintegrated, the Chapter 13 trustee is, at the very least, a custodian of funds having the duty to deliver them to the party with the best claim to them."). Moreover, after conversion, a Chapter 13 trustee still has the duty to turn over to the Chapter 7 trustee any records and property of the estate in her possession or control, and to file a final report and account. Fed. R. Bankr. P. 1019(4) and (5)(B)(ii). Accordingly, "[t]he language of § 348(e) terminating the trustee's services upon conversion cannot be taken too literally." *In re Parrish*, 275 B.R. 424, 430 (Bankr. D.D.C. 2002).

At least one court has distinguished "post-confirmation reporting duties" from "substantive administrative matters related to a chapter 13 trustee's core responsibilities," holding that the trustee retains the authority to carry out the former duties but not the latter. *See Michael I*, 436 B.R. at 330-31. However, "[s]ince Congress intended for the trustee to perform several ancillary duties to clean-up and finalize the administration of the estate, . . . there is no logical reason why distribution of funds pursuant to the previously confirmed reorganization plan cannot be included as one of those administrative duties." *Michael II*, 699 F.3d at 320 n.8 (Roth, J., dissenting). Although it is clear, and understandable, that the Chapter 13 trustee does not retain any control over assets that have passed into the new Chapter 7 estate and come under the control of the Chapter 7 trustee, *see Perkins*, 36 B.R. at 620, this does not imply that the Chapter 13 trustee likewise loses control over assets outside the Chapter 7 estate. Even after termination of her services, Viegelahn still has a responsibility to distribute the remaining funds in her possession to the parties with the best claim to them. Section 348(e) does not establish who, between Harris and his creditors, has the better claim.

Harris also cites *In re Nash*, 765 F.2d 1410, 1413 (9th Cir. 1985), for the proposition that conversion of the case vacates the confirmed plan. However, *Nash* is inapposite here because it dealt with a dismissal rather than a conversion. In holding that undistributed funds held by the trustee must be returned to the debtor upon dismissal of a Chapter 13 case, *Nash* relied upon a statute that pertains only to

a dismissal,[3] and explicitly distinguished situations involving conversion:

> Even assuming that *Resendez* and *Giambitti* correctly hold that wage deductions received prior to dismissal no longer belong to a Chapter 13 debtor during the administration of the plan, those cases involved a conversion to Chapter 7. They do not address the fact that dismissal revests the property of the estate in the debtor. 11 U.S.C. § 349(b)(3). No similar Bankruptcy Rule or Code provision contemplates the revesting of the estate property upon conversion to Chapter 7.

Nash, 765 F.2d at 1414.[4]

Nevertheless, some courts have relied on *Nash* to hold that conversion of a Chapter 13 case "vacates" the Chapter 13 plan such that the trustee has no

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[3] "Unless the court, for cause, orders otherwise, a dismissal of a case other than under [Chapter 7] . . . revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case . . . ." 11 U.S.C. § 349(b)(3).

[4] *See also In re Plata*, 958 F.2d 918, 922-23 (9th Cir. 1992) (Brunetti, J., dissenting) (explaining why the reasoning in *Nash* is inapplicable in conversion cases).

further authority to make payments to creditors pursuant to the plan. *See Michael I*, 436 B.R. at 329-30; *Boggs*, 137 B.R. at 410. Other courts before *Nash* have reached the same conclusion, for example:

> Upon confirmation of the debtors' Chapter 13 plan, title to the property of the Chapter 13 estate vests in the debtor except as otherwise provided in the plan or the order confirming the plan. 11 U.S.C. § 1327(b) [other citations omitted]. When a Chapter 13 case is converted to a case under Chapter 7, the Chapter 13 plan and the order confirming that plan are no longer in force. *In re Doyle*, 11 B.R. 110, 111 (Bankr. E.D. Pa. 1981). Since the Chapter 13 plan is no longer in effect, the creditors of the Chapter 13 debtor may not claim rights in the undistributed funds superior to the debtor. Thus, the undistributed funds held by the Chapter 13 trustee must be returned to the debtor.

Peters, 44 B.R. at 73.

We do not read so much into the fact that upon conversion, a Chapter 13 plan is "no longer in force." It is clear that after conversion, the debtor's continuing obligations under the plan (such as the obligation to keep making payments to the trustee) cease; likewise, the plan does not continue to bind creditors. However, it does not follow that the plan should thereafter be considered retroactively undone in full, and no statutory authority supports such an

interpretation. To the contrary: as discussed above, under the Bankruptcy Code conversion does not eliminate the trustee's power and duty to wrap up certain affairs of the estate. Similarly, there is no reason why prospective termination of the plan necessarily prohibits the trustee from distributing the funds remaining in her possession – which were paid at a time when the plan *was* still in force, and the debtor was still obligated to make payments – pursuant to the plan.

Viegelahn's statutory arguments are likewise unavailing. Relying primarily on 11 U.S.C. § 1326(a)(2), Viegelahn argues that creditors obtain a vested right to receive payments pursuant to a confirmed Chapter 13 plan once the debtor transfers the payments to the trustee. Under 11 U.S.C. § 1326(a)(1)(A), "[u]nless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount . . . proposed by the plan to the trustee." Furthermore, under 11 U.S.C. § 1326(a)(2), "[i]f a [Chapter 13] plan is confirmed, the trustee shall distribute any such payment [made pursuant to paragraph (1)(A)] in accordance with the plan as soon as is practicable." Some courts have concluded that:

> The word "shall" in section 1326(a)(2) creates the condition of a trust. Creditors have a right to the funds in an active confirmed chapter 13 plan upon payment by the debtor. The speed by which the chapter 13 trustee makes distribution should not determine the

> rights of creditors and debtors in the funds. Payments received from debtors from post-petition property before the filing date of the motion to convert are subject to the confirmed chapter 13 plan.

Waugh, 82 B.R. at 400; *see also Galloway*, 134 B.R. at 603. Some courts have also noted the language in § 1326(a)(2) providing that "[i]f a plan is not confirmed, the trustee shall return any such payments" made pursuant to paragraph (1)(A), and have reasoned that the absence of a parallel provision dealing with undistributed post-confirmation funds suggests that such funds should *not* be returned to the debtor. *See, e.g.*, *Galloway*, 134 B.R. at 603; *Burns*, 90 B.R. at 304.

Most courts relying on § 1326(a)(2) to find vested rights in creditors have failed to recognize that the "shall distribute" language does not apply to post-confirmation payments made by the debtor to the trustee. One court did in fact recognize this limitation, but discerned a broader congressional purpose:

> While Section 1326(a)(2) does not specifically state that it applies to post-confirmation payments, we do have a congressionally stated intent that upon confirmation payments are to be disbursed pursuant to the plan. Logically, this was intended to include any payments made prior or subsequent to confirmation. When the provision is considered together with

> the Section 1326(c)[5] requirement that the trustee shall make payments to creditors and the previously noted exceptions of Section 1306 and 1327[6], one can reasonably infer that Congress intended that post-confirmation payments made pursuant to the plan are likewise to be distributed to creditors provided for by the plan.

Lennon, 65 B.R. at 137.

This reasoning, however, has been rejected by other courts:

> By its terms, § 1326(a)(2) does not pertain to funds received by a trustee *after* confirmation of a Chapter 13 plan. The cases finding "creditor vesting" of post-confirmation payments by implication from § 1326(a)(2) do so without citing legislative history for that proposition. . . .
>
> . . .
>
> I cannot conclude that Congress intended legislatively to create trusts

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[5] 11 U.S.C. § 1326(c) states that "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."

[6] These provisions are discussed below.

> for creditors in enacting § 1326(a)(2) and (c); rather, Congress was apparently dealing with the question of when plan payments are to begin, the disposition of funds in the event no plan is confirmed, and who is to handle the funds.

Boggs, 137 B.R. at 410. Or, in slightly different terms: "§ 1326(a)(2) and (c) only address the obligation of the trustee to distribute payments in accordance with a confirmed plan; they do not vest creditors with any property rights." *Michael II*, 699 F.3d at 313.

Furthermore, if we were to hold that a debtor's payment of funds to the trustee pursuant to a Chapter 13 plan gives *specific* creditors a vested right to receive the funds, this would not support Viegelahn's actions. Under the plan in this case, $352 from each payment was intended to go to Chase until Harris' mortgage arrears were repaid. After the automatic stay was lifted and Harris' home was foreclosed, Viegelahn placed a hold on these funds rather than distributing them to Chase, which caused funds to accumulate. When Harris converted to Chapter 7, Viegelahn distributed the accumulated funds to other creditors, who would never have received them if they had been distributed to Chase as originally intended. Accordingly, if a right to these funds had vested specifically in Chase (the original intended recipient) when Harris made his payments to Viegelahn, the other creditors would have no right to them. Viegelahn's actual argument seems to be that the debtor's payment of funds to the trustee vests the class of creditors in general with a right to

payment. However, we find no support for such a rule in the Bankruptcy Code or in any legislative history.

Viegelahn also argues, based on 11 U.S.C. § 1327(a), that Harris "continues to be bound by the terms of the Chapter 13 plan[,] despite his election to convert to Chapter 7[,] with regard to payments made to the Trustee prior to conversion and not yet disbursed to creditors." Section 1327(a) states that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). However, it is well settled that upon conversion to Chapter 7, "the chapter 13 plan and the order confirming that plan are no longer in force." *In re Doyle*, 11 B.R. 110, 111 (Bankr. E.D. Pa. 1981); *see also Michael II*, 699 F.3d at 313 ("Conversion to a Chapter 7 case necessarily ends the Chapter 13 case, which also terminates that Chapter 13 estate."). Because it is not generally true that the Chapter 13 plan "continues to bind" the parties after conversion, § 1327(a) does not establish that creditors have a continuing right to payment under the plan after conversion.

In holding that the debtor has a greater right than his creditors to undistributed funds held by the trustee at the time of conversion, the Third Circuit's opinion in *Michael II* relied heavily upon 11 U.S.C. § 1327(b), which states that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of

the estate in the debtor."[7] As the court explained:

> In the context of a Chapter 13 case, § 1327(b) vests all property of the Chapter 13 estate in the debtor on confirmation of the plan. Thus when the debtor transfers funds to the Chapter 13 trustee to fulfill its obligations under a confirmed plan (or, as here, wages are assigned directly to the Chapter 13 trustee under a garnishment order), the funds become part of the estate, and the debtor retains a vested interest in them. Though creditors have a right to those payments based on the confirmed plan, the debtor does not lose his vested interest until the trustee affirmatively transfers the funds to creditors.

Michael II, 699 F.3d at 313.

It is true that under §§ 1306(b) and 1327(b), a post-confirmation Chapter 13 debtor generally retains possession of, and a vested interest in, his property, including post-petition wages. However, *Michael II* errs by ignoring the clear exception to this general rule: "except as otherwise provided in the plan or the order confirming the plan." If the plan requires the debtor to make payments to the trustee

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[7] Similarly, 11 U.S.C. § 1306(b) states that "[e]xcept as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."

that will be distributed to creditors, the debtor certainly does not retain possession of these payments. Likewise, it would seem that the confirmation order specifically divests the debtor of any interest he may have in the payments made to the trustee. In the words of one bankruptcy court:

> When confirmed, the plan governs the relations of the parties and the debtor is bound to make the specified payments provided in the confirmed plan. These payments are specifically earmarked and set aside for distribution to creditors provided for by the confirmed plan. To the extent that the confirmed plan provides for payment from debtor's future earnings and the debtor actually makes payment to the trustee pursuant to that plan, the debtor is not entitled to possession nor is the debtor vested with title to such payments. Sections 1306(b) and 1327(b) specifically except such payments from their provisions since the debtor's right of possession and vesting of title is limited to all sums and property not otherwise provided for in the confirmed plan or confirmation order. These exceptions to possession and vesting of title in debtor indicate that debtor is to have no continuing interest in payments actually made pursuant to a confirmed plan.

Lennon, 65 B.R. at 136.[8]

The Third Circuit also reasoned that "absent anything to the contrary (and we know of nothing), by providing that a debtor who converts in bad faith is not entitled to this post-petition property, § 348(f)(2) logically requires that a debtor receive the property if he acts in good faith." *Michael II*, 699 F.3d at 313-14. The court went on to explain that "if a debtor does not act with bad faith in converting, logically the property should not go automatically to creditors; otherwise the penalty for a bad faith conversion would be diminished significantly." *Id.* at 315. This argument fails to recognize that undistributed post-petition wages paid to the trustee under the Chapter 13 plan constitute only a subset of the debtor's post-petition property. If the debtor is found to have converted in bad faith, *all* of the property he has acquired after filing will be included in the Chapter 7

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[8] Viegelahn attempts to distinguish *Michael II* on the ground that the Chapter 13 plan in this case specifically provides that "[u]pon confirmation of the plan, all property of the estate *shall not vest in the Debtor(s)*, but shall remain as property of the estate subject to the automatic stay of 11 U.S.C. §362." (Emphasis added). However, the order confirming the plan also states that "[s]uch property as may revest in the Debtor shall so revest only upon further Order of the Court or upon dismissal, conversion, or discharge." We find it unnecessary to define with precision the property that "may revest in the Debtor." By requiring Harris to pay part of his wages to the trustee for distribution to creditors, the order clearly did not contemplate that such payments would revest in Harris.

estate and therefore be liquidated.[9] Accordingly, distributing the remaining payments held by the trustee at the time of conversion neither renders § 348(f)(2) superfluous nor removes the disincentive for bad faith in most cases.

III. Considerations of Policy and Equity

Because we find little guidance in the Bankruptcy Code as to whether undistributed funds held by the Chapter 13 trustee at the time of conversion should be returned to the debtor or distributed to creditors, we turn to considerations of equity and policy. When Congress enacted § 348(f) in 1994 to clarify that property acquired after filing a Chapter 13 petition would not pass into the Chapter 7 estate upon conversion absent bad faith, the House Report explained that "to hold otherwise would create a serious disincentive to chapter 13 filings." H.R. Rep. No. 103-835, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. Subsequent court opinions have interpreted this legislative history as reflecting a congressional policy of encouraging debtors to attempt repayment through Chapter 13 and removing disincentives that would discourage this. Both the district court in this case and the Third Circuit in *Michael II* placed great weight on this consideration. The district court noted "the

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[9] Of course, it is possible that upon conversion, the debtor may no longer have in his possession any property acquired after filing the Chapter 13 petition; in that specific scenario, undistributed wages held by the trustee would constitute all of the debtor's remaining post-petition property.

Congressional policy of encouraging debtors to attempt a Chapter 13 bankruptcy—through which a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7 — without penalty if that attempt fails." The district court further explained that "[h]olding that [the] Debtor is not entitled to the funds at issue in this case would create precisely the kind of disincentive to file a Chapter 13 bankruptcy that Congress was trying to avoid." *See also Michael II*, 699 F.3d at 314-16.

Bobroff, which was explicitly approved in the House Report, recognized that "[i]f debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished." 766 F.2d at 803. This is certainly true; in *Lybrook*, which was explicitly repudiated in the House Report, the debtor inherited land worth $70,000 while his Chapter 13 plan was in place, and it was subsequently liquidated when he converted to Chapter 7. 951 F.2d at 137-38. Had he initially filed under Chapter 7 rather than attempting to repay his creditors through Chapter 13, he would have been able to keep the land. Accordingly, it is understandable that property acquired while proceeding under Chapter 13 should generally not pass into the Chapter 7 estate upon conversion. It is always possible that one might unexpectedly acquire some valuable asset, and if the rule were otherwise, proceeding under Chapter 13 would court the risk

that any such asset could be lost through liquidation – an obvious disincentive.

On the other hand, it is unlikely that a debtor would be meaningfully deterred by the knowledge that payments made under a confirmed Chapter 13 plan will not be returned to him if he chooses to convert to Chapter 7. As one court explained, such a rule "will not discourage any individuals from proceeding in Chapter 13, since it simply requires them to fully honor their obligation under a confirmed plan up to the point when they voluntarily wish to terminate the provisions of the plan and have their case dismissed or converted to a Chapter 7 case." *Bell*, 248 B.R. at 240. Similarly, we fail to perceive how such a rule "penalize[s]" a debtor for attempting Chapter 13. *Boggs*, 137 B.R. at 411. It is the debtor who proposes the payment plan in the first place, with the explicit provision that the funds are to be used to pay creditors. Because the funds are out of the hands of the debtor after payment and under the control of the trustee, it is essentially fortuitous whether any undistributed funds are still in the hands of the trustee at the time of conversion.[10] And "if the undistributed funds revert to [the debtor], instead of being distributed to the creditors in accordance with the plan's terms, [the debtor] would

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[10] If undistributed funds are returned to the debtor, both the creditors' right to receive the payments and the debtor's chance of having funds returned would be dependent on the trustee's speed in distributing the payments. *See Waugh*, 82 B.R. at 400.

receive a windfall." *Michael II*, 699 F.3d at 320 (Roth, J., dissenting). Of course, because the debtor can choose to convert to Chapter 7 at any time and thereby avoid making any further payments under the Chapter 13 plan, he retains the power to prevent any additional wages from going into the hands of creditors.

As suggested above, wages paid to the trustee pursuant to the Chapter 13 plan should be distinguished from the debtor's other property acquired after the date of filing. The dissenting opinion in *Michael II* explains this distinction:

> I agree that [§ 348(f)] described what became of property or rights to property acquired by the debtor during the pendency of the Chapter 13 proceedings. I have no argument against this interpretation. Mr. Bobroff keeps his potential tort recovery and Mr. Lybrook keeps the farm land inherited from his father because the tort recovery and the farmland inheritance were not property of the estate as of the date of the filing of the petition. To the extent that Michael's wages were not attached, the amendment also covered these unattached wages earned during the course of the Chapter 13 bankruptcy . . . .
>
> However, we are not dealing simply with wages here but with that portion of the wages that had been attached under the plan and paid to the trustee for

> distribution to the creditors. I maintain that there is a crucial difference.[11]

Michael II, 699 F.3d at 319 (Roth, J., dissenting). We conclude that returning undistributed funds to the debtor is not justified by the policy of encouraging debtors to proceed through Chapter 13 rather than Chapter 7.

Additionally, distribution of the funds to creditors is supported by strong considerations of fairness. As the dissenting opinion in *Michael II* explained, "the debtor makes payments in order to fulfill his obligations under the reorganization plan and in exchange for the benefits he derives from the plan." *Michael II*, 699 F.3d at 320 (Roth, J., dissenting). Or, in other words, "the attached wages are the *quid pro quo* that the debtor has given up during the pendency of the reorganization in return for being permitted to stave off foreclosure and cure the mortgage default, retain the use of his

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[11] The next sentence is: "It is my position that, although the debtor's unattached wages earned during the reorganization period will not be included in the Chapter 7 estate, the attached wages that have been paid to the trustee pursuant to the plan should be." *Michael II*, 699 F.3d at 319 (Roth, J., dissenting). This last clause appears to be an error; elsewhere, the dissent argues not that these funds should be included in the Chapter 7 estate, but that they should be distributed by the Chapter 13 trustee pursuant to the confirmed plan.

automobile, and enjoy the automatic stay." *Id.*[12] Generally,

> [t]he benefits of proceeding in Chapter 13 for any given debtor are numerous and varied, including, but not limited to obtaining a 'super discharge,' saving a residence from foreclosure, avoiding a substantial abuse dismissal, cramming down secured assets, and having the benefit of the automatic stay for an extended period of time.

Bell, 248 B.R. at 239 n.3.

"Conversion does not retroactively alter this arrangement and undo the benefits the debtor received from the plan." *Michael II*, 699 F.3d at 320 n.8 (Roth, J., dissenting). Moreover, conversion does not undo the disadvantages that creditors may have suffered as a result of the plan, such as depreciation of secured property. As one court explained:

> The Court would also observe that in the case at bar and prior to conversion, the Debtors retained possession of and continued to use certain property that was security for certain of their debts.

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[12] We note that in this case, Harris agreed to give up his automobile to satisfy a debt greater than the value of the automobile.

> This is typical of most chapter 13 cases. The security normally consists of such items as automobiles, homes and household goods and furnishings. The secured lenders are prohibited from taking possession of their property because the debtor has a confirmed plan which proposes to pay them each month. It appears to this Court to be patently unfair to allow a debtor to drive and depreciate an automobile, occupy a home or use household goods based on a promise to his creditors in the form of a court approved plan, and then allow the debtor to snatch away the monies which the trustee is holding to make the payments, but has not yet disbursed, by allowing the debtor to pick an opportune time to convert.

O'Quinn, 143 B.R. at 413. Although, as discussed above, payments made under the plan do not give creditors any vested rights to payment, we conclude that the creditors' claim to the undistributed funds is superior to that of the debtor.

CONCLUSION

For the reasons explained above, we REVERSE the district court's order and REMAND for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re:	§	
	§	
CHARLES E. HARRIS III,	§	Cv. No.
	§	SA:12-CV-00540-DAE
Debtor.	§	Bankr. No.
	§	10-50655-lmc
	§	
MARY K. VIEGELAHN, Chapter 13 Trustee,	§	
	§	
Appellant,	§	
	§	
vs.	§	
	§	
CHARLES E. HARRIS III,	§	
	§	
Appellee.	§	

MEMORANDUM OPINION AND ORDER AFFIRMING BANKRUPTCY COURT'S ORDER COMPELLING RETURN OF FUNDS

Appellant Mary K. Viegelahn, Chapter 13 Trustee ("the Trustee"), appeals the February 29, 2012 Order Compelling Return of Funds issued by the United States Bankruptcy Court for the Western District of Texas. (Doc. # 1-4 Ex. 4.)[1] The Bankruptcy

[1] Except where otherwise noted, all citations are to the docket in Cv. No. SA:12-CV-00540-DAE.

Court's Order granted debtor Charles E. Harris III's motion to compel the Trustee to turn over undistributed funds collected pursuant to a confirmed Chapter 13 plan in a case that was later converted to Chapter 7. Having considered the record and the parties' briefs, the Court, for the reasons below, **AFFIRMS** the Order of the Bankruptcy Court.

BACKGROUND

On February 24, 2010, Charles E. Harris III ("Debtor") filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code. (Doc. # 1-4 Ex. 6 ¶ II.) His plan of reorganization, which was confirmed on April 15, 2010, called for him to pay the Trustee, for distribution to various creditors, $530.00 per month for 60 months. (Doc. # 1-4 Ex. 11.)

In November of 2010, after Debtor fell behind on his mortgage (doc. # 9 at 3), the Bankruptcy Court lifted the automatic stay preventing Chase the Home Finance from foreclosing on Debtor's Residence.[2] (Bankr. Case No. 10-50655-lmc [hereinafter Bankr. Case], doc. # 28.) Debtor moved out of his home and into a rental but continued to make payments to the Trustee pursuant to the pay order. (Doc. # 9 at 3.) In light of the foreclosure, the Trustee placed a hold on funds designated for the mortgage under the plan,

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[2] The Bankruptcy Code's automatic stay, which takes effect immediately upon the filing of a bankruptcy petition, helps ensure the orderly distribution of assets by temporarily protecting the property of the debtor's estate from the reach of creditors. *See* 11 U.S.C. § 362(h).

and funds began to accumulate in the Trustee's account. (Doc. # 6 at 11.)

On November 21, 2011, Debtor, having determined that he could no longer afford the plan payments, filed a Notice of Voluntary Conversion that converted his case from a Chapter 13 reorganization of debts to a Chapter 7 liquidation. (Bankr. Case, doc. # 30.) At that time, the Trustee had $5,519.22 that she had received from Debtor but had not distributed to creditors. (Doc. # 6 at 11.)

Around the same time, Debtor's attorney sent an email to the Trustee requesting to be paid $1,200.00 in attorney's fees out of the funds that the Trustee had received from Debtor. (Doc. # 1-4 Ex. 6 ¶ III.) The Trustee disbursed the requested amount to Debtor's attorney on or about November 22, 2011, leaving $4,319.22 in Debtor's account. (*Id.*)

On or about December 1, 2011—ten days after Debtor converted his case to Chapter 7—the Trustee distributed the remaining funds to several of Debtor's creditors in accordance with the former Chapter 13 plan. (*Id.*) On or about December 12, 2011, Debtor's attorney requested that those funds be refunded to Debtor. (*Id.* ¶ IV.) The Trustee refused, claiming she was required to distribute to creditors any funds received before the case was converted to Chapter 7. (*Id.*)

On December 29, 2011, Debtor, who had expected to receive the money held by the Trustee to cover his ongoing personal expenses, filed a Motion to Compel Return of Funds. (Doc. # 1-4 Ex. 6.) The Bankruptcy Court granted Debtor's Motion on

February 29, 2012, ordering the Trustee to pay Debtor $4,319.22. (*Id.* Ex. 4.) On March 5, 2012, the Trustee timely appealed the Bankruptcy Court's Order to this Court pursuant to 28 U.S.C. § 158(a). (*Id.* Ex. 3.)

The Trustee submitted the following issues for appeal:

1. Did the Bankruptcy Court commit error by finding that the Chapter 13 Trustee is not duly authorized to disburse funds to a debtor's creditors post-conversion that were received by the Trustee from the debtor prior to conversion?

2. Do undistributed payments to the Chapter 13 Trustee made by the debtor post-confirmation but pre-conversion re-vest in the debtor, or do such payments remain subject to disbursement to creditors by the Chapter 13 Trustee pursuant to a confirmed plan?

3. Does 11 U.S.C. § 348(e) prohibit a Chapter 13 Trustee from disbursing to creditors, pursuant to a confirmed plan, payments made by the debtor to the Chapter 13 Trustee prior to conversion to Chapter 7?

4. Does 11 U.S.C. § 1326(a)(2)—which states: "[A] payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in

accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payment to the debtor after deducting any unpaid claim under § 503(b) of this title"—vest rights in the creditors such that a Chapter 13 Trustee must disburse to creditors plan payments made by the debtor to the Trustee post-confirmation but pre-conversion?

5. Does 11 U.S.C. § 1327, which provides that a confirmed plan binds the debtor and each creditor, allow the Chapter 13 Trustee to disburse to creditors payments made by the debtor to the Chapter 13 Trustee post-confirmation but prior to conversion to Chapter 7?

(Doc. # 1-4 Ex. 1.) These five issues all present essentially the same question: Was the Trustee required to distribute the funds in her possession at the time of conversion to Debtor or to his creditors?

STANDARD OF REVIEW

A district court reviews a bankruptcy court's findings of fact for clear error. *In re Kennard*, 970 F.2d 1455, 1457–58 (5th Cir. 1992) (citing *In re Multiponics, Inc.*, 622 F.2d 709, 713 (5th Cir. 1980)); Fed. R. Bankr. P. 8013. Conclusions of law are reviewed de novo. *Id.* at 1458; *In re Stembridge*, 394 F.3d 383, 385 (5th Cir. 2004).

DISCUSSION

This appeal raises a question on which the Fifth Circuit has yet to rule involving the interpretation of Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101–1532 (2005) ("the Code"): If, at the time of conversion from a Chapter 13 reorganization of debts to a Chapter 7 liquidation, the Trustee possesses funds collected pursuant to a confirmed Chapter 13 reorganization plan, must the Trustee return those funds to the debtor or distribute them to creditors in accordance with the plan? The Third Circuit is the only court of appeals that has directly addressed this issue; it concluded that the funds in question must be returned to the debtor. *See In re Michael*, 699 F.3d 305, 317 (3d Cir. 2012).

Because this is a pure question of law, the Court reviews the Bankruptcy Court's conclusion de novo. For the reasons that follow, this Court agrees with the Third Circuit's reasoning and concludes that the Trustee was required to return the funds to Debtor.

I. Bankruptcies Under Chapters 7 and 13

The Court begins with a brief overview of bankruptcies under Chapters 7 and 13 of the Code and conversions from Chapter 13 to Chapter 7.

A. Chapter 7 Liquidations

A Chapter 7 bankruptcy is also known as a "straight bankruptcy" or liquidation and is generally available only to debtors who meet certain low-income requirements. *See* 11 U.S.C. § 707(b)(2)(A); *In*

re Hill, 328 B.R. 490, 497 (Bankr. S.D. Tex. 2005) (holding that debtors with combined monthly income of more than $13,600.00 were "not needy debtors entitled to relief under chapter 7"). Filing a Chapter 7 petition automatically creates an "estate" comprised of all of a debtor's legal and equitable interests in property as of the filing date. 11 U.S.C. §§ 301(a), 541. Subject to certain exceptions, *see id.* § 541(a), property acquired after filing for Chapter 7 bankruptcy is not included in the estate.

An impartial trustee is appointed to administer the estate, *id.* § 701, selling the debtor's nonexempt assets and using the proceeds to pay creditors in accordance with the provisions of the Code, *id.* §§ 704, 726. With certain exceptions, *see id.* § 523, the remaining debts are then fully discharged, *id.* § 727. However, a bankruptcy court may refuse to grant discharge in certain circumstances, such as in cases of fraud, *id.* § 727(a)(4); where the debtor has filed for Chapter 7 relief within the previous eight years, *id.* § 727(a)(8); or where the court determines that granting relief would be "an abuse of the provisions of [Chapter 7]," *id.* § 707.

B. Chapter 13 Debt Reorganizations

While Chapter 7 uses liquidation to satisfy existing debt, Chapter 13 looks to future income. Also known as a "wage earner's plan," Chapter 13 enables individuals with regular income to develop a plan to repay all or part of their debts over a three- to five-year period. *Id.* § 1322(d). In order to be confirmed by the bankruptcy court, a Chapter 13 plan must provide for creditors to receive at least as much as they would have in a Chapter 7 liquidation.

Id. § 1325(a)(4). As under Chapter 7, an impartial trustee administers the case, collecting payments from the debtor and making distributions to creditors. *Id.* § 1302(b). The Chapter 13 bankruptcy tends to be favored by debtors who have fallen behind on secured loan payments, such as mortgages and car loans, since it enables the debtor to maintain possession of the property while catching up on payments through a court-approved repayment plan. *See id.* § 362.

The estate created upon filing a Chapter 13 petition is not the same as a Chapter 7 estate. While a Chapter 7 estate is, roughly speaking, a "snapshot" of the debtor's assets at the time of filing, the Chapter 13 estate includes both "the property specified in § 541" that exists at the time of filing and "all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first . . . ." *Id.* § 1306(a) (emphasis added). This includes "earnings from services performed by the debtor after the commencement of the case," *id.* § 1306(b), which is why a Chapter 13 plan is ordinarily funded by the debtor's future income.

A debtor must begin making payments to the Chapter 13 trustee within 30 days of the filing of the plan or an order for relief, whichever is earlier. *Id.* § 1326(a)(1). The trustee must retain these payments "until confirmation or denial of confirmation [of the plan]." *Id.* § 1326(a)(2). Confirmation of the plan (1) vests all property of the estate in the debtor (except

as otherwise provided), *id.* § 1327(b); (2) binds the debtor and its creditors, *id.* § 1327(a); and (3) obligates the trustee to distribute the debtor's payments under the plan to creditors, *id.* § 1326(a)(2), (c). "If a plan is not confirmed," however, "the trustee shall return any such payments not previously paid . . . to the debtor, after deducting any unpaid claim allowed under section 503(b)." *Id.* § 1326(a)(2).

C. Conversion from Chapter 13 to Chapter 7

At any time during the Chapter 13 proceeding, even following confirmation of the plan, a debtor may convert his case to a Chapter 7 liquidation. 11 U.S.C. § 1307(a). Conversion "does not effect a change in the date of filing of the petition." *Id.* § 348(a). In other words, when a case is converted from Chapter 13 to Chapter 7, the order converting the case is effectively backdated to the date on which the Chapter 13 petition was filed. Accordingly, the Code provides that "property of the estate in the converted [Chapter 7] case shall consist of property of the estate, as of the date of filing of the [Chapter 13] petition, that remains in the possession of or is under the control of the debtor on the date of conversion." *Id.* § 348(f)(1)(A) (emphasis added). Where the conversion was in bad faith, however, section 348(f)(2) provides that "the property of the estate in the converted case shall consist of the property as of the date of conversion." *Id.* § 348(f)(2) (emphasis added).

II. Did Plan Confirmation Vest in Debtor's Creditors a Right to the Funds?

The funds at issue in this case were garnished from Debtor's wages during the time after confirmation of his Chapter 13 plan but before conversion of his case to Chapter 7. (Doc. # 6 at 11.) Accordingly, there is no dispute that these funds were not "property of the estate . . . as of the date of filing of the [Chapter 13] petition . . . ." 11 U.S.C. § 348(f)(1)(A). A plain reading of § 348(f)(1)(A) would seem to establish, therefore, that the funds should not be considered part of the Chapter 7 estate in the absence of a bad-faith conversion. *See* § 348(f)(2). And if the funds are not part of the Chapter 7 estate, argues Debtor, they should be returned to him upon conversion. (Doc. # 9 at 7.).

In support of this argument, Debtor points to the Fifth Circuit's decision in *Stamm v. Morton (In re Stamm)*, 222 F.3d 216 (5th Cir. 2000). (Doc. # 9 at 5–7.) In *Stamm*, debtors filed a Chapter 13 petition and began making payments to the trustee. *Id.* at 216. When they were "unable to confirm a [Chapter 13] plan," however, the debtors converted their case to Chapter 7. *Id.* Upon conversion, the Chapter 13 trustee distributed to the Chapter 7 trustee the payments the debtors had made while awaiting confirmation. *Id.* The Chapter 7 trustee filed a Motion for Determination of whether the funds were property of the Chapter 7 estate, and both the bankruptcy court and the district court held that they were. *Id.* at 216–17.

The Fifth Circuit reversed, basing its decision on the 1994 amendments to § 348. *Id.* at 218. The court noted that Congress, as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 311, 108 Stat. 4106, 4137-38, had amended § 348 to resolve a circuit split on the issue of whether post-petition Chapter 13 income remained property of the estate upon conversion to Chapter 7. *Id.* at 217 (citing *Baker v. Rank (In re Baker)*, 154 F.3d 534, 536 (5th Cir. 1998) (discussing the split and noting that the issue was confusing because it involved the interplay of several Code provisions—§ 541, § 1306, and § 348)); *see also In re Bobroff*, 766 F.2d 797, 803–04 (3d Cir. 1985) (holding that post-petition income does not remain property of the estate); *In re Lybrook*, 951 F.2d 136, 138 (7th Cir. 1991) (holding that post-petition income remains property of the estate); *In re Lindberg*, 735 F.2d 1087, 1089–90 (8th Cir. 1984) (same). Looking to the legislative history of § 348, the *Stamm* court concluded that Congress meant to clarify that "[d]ebtors' wages, earned after the filing of their Chapter 13 petition and before discharge under Chapter 7, are not part of the Chapter 7 estate." *Id.* at 218. Accordingly, the *Stamm* court ordered that the payments the debtors had made prior to conversion be returned to them. *Id.*

The Trustee "does not dispute that post [-]petition wages are not property of a Chapter 7 estate." (Doc. # 10 at 4.) However, she insists that funds collected under a confirmed plan "belong to the Chapter 13 estate" (*id.* at 8 (emphasis added)), not to Debtor. Confirmation of a plan, asserts the Trustee, vests certain rights in the creditors. It creates an irrevocable trust in the funds the Trustee collects,

and the Trustee has no choice but to distribute those funds according to the plan. (Doc. # 6 at 16.) Accordingly, the Trustee insists that *Stamm* is distinguishable from this case since the Chapter 13 plan in that case had not been confirmed prior to conversion. (*Id.* at 3; *see also In re Stamm*, 222 F.3d at 217 (stating that the funds at issue were "post-commencement pre-confirmation wages paid to the Chapter 13 Trustee").)

The Trustee bases her argument on § 1326 and § 1327 of the Code. Section 1326 provides that "[i]f a [Chapter 13] plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable" and that "[i]f a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors . . . to the debtor . . . ." 11 U.S.C. § 1326 (emphases added). Pointing to the mandatory language of this section, the Trustee argues that she had no choice but to distribute any funds she received from Debtor pursuant to his confirmed plan. (Doc. # 6 at 17.)

Although § 348(e) states that "[c]onversion of a case . . . terminates the service of any trustee or examiner that is serving in the case before such conversion," the Trustee argues that this section does not operate to prevent a trustee from disbursing funds in her possession at the time of conversion. (*Id.* at 15.) She points out that a trustee's services clearly do not terminate immediately upon conversion since she is required to wind up the administration of the Chapter 13 estate by turning over to the Chapter 7 trustee the records and property of the estate in her

possession, *see* Fed. R. Bankr. P. 1019(4), and by filing a final report and account, *see* Fed. R. Bankr. P. 1019(5)(B)(ii). (Doc. # 6 at 15.) Because § 1326(a)(2) states that a trustee "shall" distribute funds received according to a confirmed plan, argues the Trustee, § 348 does not relieve a Chapter 13 trustee of the duty to disburse to creditors monies received post-confirmation and pre-conversion. (*Id.* at 16.)

A number of courts, mostly in decisions written before the addition of § 348(f), have agreed with the Trustee's argument. In *In re Waugh*, for example, the Bankruptcy Court for the Western District of Pennsylvania held that "[t]he word 'shall' in section 1326(a)(2) creates the condition of a trust" and that "[c]reditors have the right to the funds in an active confirmed chapter 13 plan upon payment by the debtor." 82 B.R. 394, 300 (Bankr. W.D. Pa. 1988); see also *In re Milledge*, 94 B.R. 218, 220 (Bankr. M.D. Ga. 1988) (same). Similarly, the bankruptcy court in In re Galloway held that after a debtor "voluntarily part[s] with wages and deliver[s] them to the custody of a trustee in performance of a confirmed Chapter 13 plan, the creditors have a vested right to receive those payments pursuant to the plan." 134 B.R. 602, 603 (Bankr. W.D. Ky. 1991); *see also In re Halpenny*, 125 B.R. 814 (Bankr. D. Haw. 1991) (same).

Central to these courts' holdings is the idea that a confirmed plan requires creditors to forgo certain rights in exchange for the debtor's promise to make payments under the plan. Under a confirmed plan, for example, creditors might be prevented from foreclosing on the debtor's home or repossessing his automobile, being forced to settle instead for the

debtor's promise to pay them back over time. As the Bankruptcy Court for the Southern District of Mississippi put it:

> It appears to this Court to be patently unfair to allow a debtor to drive and depreciate an automobile, occupy a home or use household goods based on a promise to his creditors in the form of a court approved plan, and then allow the debtor to snatch away the monies which the trustee is holding to make the payments, but has not yet disbursed, by allowing the debtor to pick an opportune time to convert.

In re O'Quinn, 143 B.R. 408, 413 (1992). By permitting Debtor to recoup the funds at issue, insists the Trustee, the Bankruptcy Court's decision "essentially allows a debtor to convert undistributed funds . . . into [his] savings account"; and this will force trustees, "in an attempt to avoid such a windfall to [debtors], to make distributions to creditors on a daily basis," which the Trustee argues is impractical. (Doc. # 6 at 24.)

Finally, these courts point to § 1326(a)(2)'s language requiring the Chapter 13 trustee to return any undistributed funds to the debtor <u>if a plan is not confirmed</u>. "Read alone," admitted the Third Circuit in *In re Michael*,

> this section arguably indicates that if a plan is not confirmed the trustee must return accumulated funds to the debtor, and that if a plan is confirmed the trustee, by implication stemming from the absence of similar

> language, is required to distribute accumulated funds to creditors as provided by the plan. That is, if Congress intended for undistributed funds held by the trustee post-confirmation to be returned to a debtor, it could have included similar language regarding post-confirmation payments in § 1326(a)(2).

699 F.3d at 311 (emphases added); *see also In re Galloway*, 134 B.R. at 603 (holding that from the language of § 1326 "[i]t is clear that the trustee shall return undistributed payments if the plan is not confirmed" and that "[t]he code is just as specific that if plan payments are made, pursuant to a confirmed plan, then the trustee shall distribute any such payments in accordance with the plan").

While the Trustee's arguments have appeal, the Court finds more persuasive the reasoning of those courts—including, most recently, the Third Circuit—that have concluded that post-confirmation, pre-conversion funds in a trustee's possession should be returned to the debtor. These courts focus on the Congressional policy of encouraging debtors to attempt a Chapter 13 bankruptcy—through which a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7—without penalty if that attempt fails. *See, e.g., In re Boggs*, 137 B.R. 408, 411 (Bankr. W.D. Wash. 1992) ("[T]he Congressional policy of encouraging debtors to repay their creditors via Chapter 13 is furthered by debtors (and their counsel) knowing they will not be penalized for attempting Chapter 13."); *In re Peters*, 44 B.R. 68, 71 (Bankr. M.D. Tenn. 1984) ("Since [§ 348] treats the date of commencement of the

Chapter 13 case as the date of commencement of the Chapter 7 case after conversion, the debtor is not penalized for originally pursuing a Chapter 13 case instead of a Chapter 7 case."); *In re Bullock*, 41 B.R. 637, 640 (Bankr. E.D. Pa. 1984) ("[T]he case is deemed to have been filed as a chapter 7 proceeding and that portion of the debtor's postpetition wages, which were deducted from his salary, were deposited in the chapter 7 estate although they were not properly includable therein . . . . Since the deducted wages were not part of the chapter 7 estate, the debtor is entitled to recover such wages in full . . . .").

This Court agrees that Congressional policy should guide the interpretation of these ambiguous Code provisions. Chapter 13 was intended to "encourage more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge." H.R. Rep. No. 95-595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5966, 1977 WL 9628. "In return for a debtor's resolve to commit more of his assets to the repayment of his creditors than would be required under a Chapter 7 liquidation, Chapter 13 of the Bankruptcy Code provides the debtor with a number of benefits unavailable under Chapter 7," such as the ability to retain his property and to better protect his credit rating. *In re Peters*, 44 B.R. 68, 71 (Bankr. M.D. Tenn. 1984); *see also In re Lennon*, 65 B.R. 130, 132 (Bankr. N.D. Ga. 1986) ("The statutory scheme of the Bankruptcy Code reflects a congressional intent to make attractive and encourage greater use, which must be voluntary, of Chapter 13 rehabilitation and creditor payment, rather than Chapter 7 liquidation with little or no creditor payment.").

Congress, in the section-by-section analysis accompanying the Bankruptcy Reform Act of 1994, included the following illustration of the "serious disincentive to file chapter 13 filings" that it hoped § 348(f) would eliminate:

> [A] debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is the property of the chapter 7 estate, the trustee would sell the home . . . to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.

In re Michael, 699 F.3d at 314 (quoting H.R. Rep. No. 103-835, reprinted in 1994 U.S.C.C.A.N. 3340, 3366, 1994 WL 562232); *see also Bobroff*, 766 F.2d at 803 ("If debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished."). It seems clear, therefore, that distributing the funds in question to Debtor's creditors would contravene Congressional policy.

Those courts holding that undistributed pre-conversion payments must be returned to the debtor reason that there is nothing unfair about returning those funds to a debtor rather than to his creditors. *See, e.g., In re Boggs*, 137 B.R. at 410 ("Th[e] creditors have had the benefit of distribution from debtors' wage contributions, which would not have been available to them under Chapter 7. In all, there seems no inherent inequity in refunding undisbursed wage contributions to debtors on conversion."). This Court agrees. By attempting a Chapter 13 bankruptcy, a debtor attempts to pay his creditors more than they would have received under a Chapter 7 liquidation. When Chapter 13 plan does not work out and a debtor exercises his right to convert to Chapter 7, "no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts by filing under Chapter 13." *In re Hannan*, 24 B.R. 691, 692 (Bankr. E.D.N.Y.). Moreover, as the Third Circuit recently noted, "no provision in the Bankruptcy Code classifies any property, including post-petition wages, as belonging to creditors." *In re Michael*, 699 F.3d at 312–13. That court explained:

> When the debtor transfers funds to the Chapter 13 trustee . . . under a confirmed plan . . . the funds become part of the estate, and the debtor retains a vested interest in them. Though creditors have a right to those payments based on the confirmed plan, the debtor does not lose his vested interest until the trustee affirmatively transfers the funds to creditors. Also, § 1326(a)(2) and (c) only

> address the obligation of the trustee to distribute payments in accordance with a confirmed plan; they do not vest creditors with any property rights.

Id. at 313. Instead, conversion from Chapter 13 to Chapter 7 "necessarily ends the Chapter 13 case, which also terminates that Chapter 13 estate." *Id.*

Of course, the Court realizes that this interpretation of the Code might incentivize bad-faith conversions—that debtors with no intention of fully repaying their creditors under a Chapter 13 plan might file a Chapter 13 petition, take advantage of the automatic stays and other benefits, and then convert to a Chapter 7 liquidation at an opportune time. However, Congress recognized this danger, too; and that, presumably, is why it drafted § 348(f)(2) to provide that "[i]f the debtor converts a case . . . in bad faith, the property of the estate in the converted case shall consist of the property as of the date of conversion." *Id.* (emphasis added). Thus, if a court determines that a debtor is attempting to "game the system," it may "punish" him by determining the Chapter 7 estate at the time of conversion instead of at the time that he filed a petition under Chapter 13. Moreover, the fact that Congress included a bad-faith exception provides additional support for the idea that Congress would want the disputed funds to be returned to Debtor. As the Third Circuit explained, "by providing that a debtor who converts in bad faith is not entitled to this post-petition property, § 348(f)(2) logically requires that a debtor receive the property if he acts in good faith." *In re Michael*, 699 F.3d at 314.

Holding that Debtor is not entitled to the funds at issue in this case would create precisely the kind of disincentive to file a Chapter 13 bankruptcy that Congress was trying to avoid. Here, Debtor attempted to repay his debts under Chapter 13, making payments under the confirmed plan for over a year and a half. (Doc. # 6 at 11.) There is no dispute that the funds at issue would not have been part of the Chapter 7 estate if Debtor had filed a Chapter 7 petition originally; nor does the Trustee allege that Debtor converted to Chapter 7 in bad faith. Thus, for the reasons given above, the Court agrees with the Third Circuit's recent decision in *In re Michael*, 699 F.3d 305 (3d Cir. 2012), and concludes that the Congressional policy favoring Chapter 13 over Chapter 7 requires that the funds at issue be returned to Debtor.

To explicitly address each of the issues presented for appeal, the Court hereby holds (1) that the Bankruptcy Court did not err in finding that a Chapter 13 trustee is not authorized to disburse to creditors, after conversion to Chapter 7, undistributed funds received prior to conversion; (2) that undistributed payments to a Chapter 13 trustee made after confirmation of a Chapter 13 plan but before conversion to Chapter 7 re-vest in the debtor upon conversion; (3) that 11 U.S.C. § 348(e) prohibits a Chapter 13 trustee from disbursing, after conversion to Chapter 7, plan payments made by the debtor prior to conversion; (4) that 11 U.S.C. § 1326(a)(2) does not vest rights in creditors that would require a Chapter 13 trustee to disburse funds to them after conversion to Chapter 7; and (5) that 11

U.S.C. § 1327 does not permit a Chapter 13 trustee to disburse to creditors, after conversion to Chapter 7, funds paid by the debtor to the trustee pursuant to a confirmed Chapter 13 plan.

The Court recognizes that a practical consequence of this holding is that "creditors will request more frequent distributions from the Chapter 13 trustee." *In re Michael*, 699 F.3d at 317. This may be inconvenient to trustees, since the most efficient manner of administering payments may be to accumulate them and distribute them to creditors at an established time. However, the Court concludes that the increased administrative burden, if any, is outweighed by the clearly expressed Congressional policy of encouraging debtors to attempt a Chapter 13 repayment plan over a Chapter 7 liquidation. Moreover, if a court finds that a debtor is attempting to "game the system," section 348(f)(2)'s bad-faith provision authorizes that court to punish such behavior by determining the Chapter 7 estate as of the date of conversion.

CONCLUSION

For the reasons given, the Court **AFFIRMS** the Bankruptcy Court's February 29, 2012 Order Compelling Return of Funds.

IT IS SO ORDERED.

DATED: San Antonio, Texas, March 22, 2013.

/s/
David Alan Ezra
Senior United States District Judge

SO ORDERED.

SIGNED this 29th day of February, 2012.

/s/
LEIF M. CLARK
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:	§	CASE NO: 10-50655C
Charles E. Harris, III	§	
DEBTOR(S)	§	CHAPTER 7

ORDER COMPELLING RETURN OF FUNDS

Upon motion of Debtor and upon the representations contained therein and evidence presented, the Court finds and therefore, it is

ORDERED that the Chapter 13 Trustee, Mary K. Viegelahn, shall pay $4,319.22 to Charles E. Harris, III.

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THIS ORDER WAS PREPARED AND SUBMITTED BY:

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No. 14-400

In The
Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT MARY K. VIEGELAHN IN OPPOSITION

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QUESTION PRESENTED

Section 1326(a)(2) of Title 11 of the United States Code, provides that payments made by the debtor to the trustee pursuant to a proposed plan shall be retained by the trustee until confirmation or denial of confirmation. Specifically: "If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable." Section 1327(a) of Title 11 binds the debtor and each creditor as to each provision of the confirmed plan. If a Chapter 13 case is converted to another chapter, 11 U.S.C. § 348(e) in theory terminates the service of a Chapter 13 Trustee as to the duties defined in the bankruptcy code, however, the trustee must "wind up" the post conversion administration of the confirmed plan, including but not limited to, the distribution to creditors, or in some instances, to the debtor, of those monies transmitted by the debtor prior to conversion. Unlike *In re Michael*, 699 F.3d 305 (3d Cir. 2012) ("*Michael II*"), the property (including wages voluntarily transmitted to the trustee) did not revest in Petition, Charles E. Harris, III (Debtor) at confirmation but remained vested in the estate pursuant to the plan and order confirming plan.

Chapter 13 of Title 11 is not intended to create a savings account while a debtor contemplates conversion to another chapter. A debtor in Chapter 13 receives the benefit of the automatic stay and for a debtor to have an expectation of retaining funds voluntarily transmitted to a trustee post-confirmation

QUESTION PRESENTED – Continued

but prior to conversion creates a windfall not intended by the Code. Both the statutory provisions of Title 11 and equity dictate that upon conversion to another chapter a debtor should not be permitted to demand return of undistributed, voluntary payments made for the benefit of creditors pursuant to the plan proposed by the debtor and confirmed by the court. It is the Chapter 13 Trustee that is best suited to "wind up" the administration of the confirmed Chapter 13 plan.

The question presented is as follows:

Whether the Trustee is required to return to a debtor funds voluntarily transmitted pursuant to a confirmed plan and in the possession of the Trustee at the time the debtor elects to convert the case to a Chapter 7 or whether the trustee should, in the process of winding up the case, distribute such funds to creditors pursuant to the plan.

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STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioner, the following provisions are also relevant: 11 U.S.C. §§ 1306(b); 1326(a)(2); and 1327(a).

In pertinent part, 11 U.S.C. § 1306(b) provides:

> Except as provided in a confirmed plan or order confirming plan, the debtor shall remain in possession of all property of the estate.

In pertinent part, 11 U.S.C. § 1326(a)(2) provides:

> A payment made under paragraph (1)(a) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors.

In pertinent part, 11 U.S.C. § 1327(a) provides:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

INTRODUCTION

Respondent, Mary K. Viegelahn (Chapter 13 Bankruptcy Trustee), respectfully submits that none of Petitioner's arguments merit further review. The decision below correctly followed equitable doctrines of the Court. Although the Fifth Circuit acknowledged that the issue before the Court has "divided courts for thirty years," only two circuit courts have addressed this issue. Pet. App. 2a. Petitioner asserts that "this Court's guidance is needed to resolve that split and to provide uniformity in the administration of the Nation's bankruptcy laws." Pet. 4. However, Petitioner has omitted an important factual distinction between the two circuit decisions, which after consideration will support a denial of the Petition for a Writ of Certiorari. In the Third Circuit, the property of the estate revested in the debtor at confirmation of the plan. *In re Michael*, 699 F.3d 305 (3d Cir. 2012) ("*Michael II*"). By contrast, in the instant case, the property remained vested in the estate at confirmation of the plan pursuant to the plan and order confirming plan. *In re Harris*, 757 F.3d 468 (5th Cir. 2014).

STATEMENT OF THE CASE

1. Factual Background

Petitioner, Charles E. Harris, III (Debtor), filed his voluntary petition, Case No. 10-50655, for Chapter 13 relief on February 24, 2010. Pet. App. 3a. His

plan of reorganization, confirmed on April 15, 2010 by the United States Bankruptcy Court for the Western District of Texas – San Antonio Division, provided for sixty (60) payments of $530.00 per month to the Respondent, the Chapter 13 bankruptcy Trustee, with a dividend to unsecured creditors of 100%. *Id.* The confirmed plan paid a fee to the Chapter 13 Trustee, attorney fees of $3,000.00, pre-petition mortgage arrears to Chase Home Finance, $900.00 to Conns Creditor Corporation for a television, and surrendered a 2005 Nissan Altima to Wells Fargo Dealer Services. Pet. App. 3a-4a. Per the confirmed plan, all property of the estate did not re-vest in the Debtor, but remained property of the estate. Pet. App. 21a, n. 8.

During the pendency of the case, because the Debtor failed to make direct post-petition mortgage payments to Chase Home Finance (a secured creditor), the automatic stay was terminated in order for Chase to pursue its in rem relief against Debtor's residence. Pet. App. 4a. Debtor did not amend his plan of reorganization after the termination of the automatic stay. The Debtor continued to make payments to the Trustee pursuant to the terms of the confirmed plan for more than one year after the stay was terminated. *Id.* The payments were pursuant to a voluntary pay order. A portion of the payments made by the Debtor accumulated in the Trustee's account originally designated for the mortgage lender, Chase Home Finance, under the confirmed plan. The Trustee placed a hold on these funds received by the Debtor

for Chase Home Finance in order for said creditor to not receive any monies as a result of its termination of the automatic stay. *Id.*

On November 21, 2011, the Debtor filed a Notice to Convert Case to Chapter 7. *Id.* The Trustee had in her possession $5,519.22 when the Debtor converted his case to Chapter 7. The Trustee disbursed a portion of the $5,519.22 to Debtor's counsel for legal fees in the amount of $1,200.00 on November 22, 2011 and the balance of $4,319.22 was disbursed to other creditors on December 1, 2011. The distribution of these funds constituted the only payment to unsecured creditors with allowed claims. This distribution paid unsecured creditors with allowed claims 26.26% of their claim amount as opposed to the 100% dividend proposed by the Debtor's confirmed plan. Nonpayment of these funds would result in a 0% dividend to unsecured creditors with allowed claims.

On December 29, 2011, the Debtor filed a Motion to Compel Return of Funds against the Trustee demanding a turnover of funds not distributed to creditors as of the date of conversion. Pet. App. 5a. The Trustee opposed Debtor's motion and a hearing was held. The Bankruptcy Court granted Debtor's motion and entered an Order Compelling Return of Funds. *Id.*

2. Procedural History

The Trustee appealed the decision of the Bankruptcy Court to the United States District Court for

the Western District of Texas. The District Court on March 22, 2013, relying on the Third Circuit's decision in *In re Michael*, 699 F.3d 305 (3d Cir. 2012), affirmed the decision of the Bankruptcy Court. *Id.* The Trustee appealed the District Court's decision to the Fifth Circuit Court of Appeals. The Fifth Circuit reversed the District Court's decision and remanded for further proceedings consistent with its opinion issued on July 7, 2014. Pet. App. 28a.

REASONS FOR DENYING THE PETITION

I. The Court Should Deny The Petition As Interlocutory.

In the case at bar, the Fifth Circuit Court of Appeals issued its opinion on July 7, 2014 and ordered that the judgment of the District Court is reversed and that the cause be remanded to the District Court for further proceedings in accordance with its opinion. Pet. App. 28a.

Because the Fifth Circuit remanded this case to the District Court for findings not inconsistent with its decision, certiorari is appropriate if this case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

In accordance with this Court's precedent, "because the Court of Appeals remanded the case, it is

not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328, 88 S.Ct. 437 (1967); *Virginia Military Institute v. U.S.*, 508 U.S. 946, 113 S.Ct. 2431 (1993) (opinion of Justice Scalia noting that this Court generally awaits a final judgment before granting a petition for certiorari).

Review is not necessary because nothing in the circuit court's decision requires immediate determination; and does not involve a matter of great national significance. Certiorari is a jurisdiction that should be exercised in extraordinary circumstances. Delaying this Court's intervention until a final decision in the lower court has been entered would best serve judicial economy. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 36 S.Ct. 269 (1916) ("As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. . . . And, except in extraordinary cases, the writ is not issued until final decree.").

II. The Decision Below Neither Creates Nor Adds To A Federal Circuit Split Requiring This Court's Review.

Review of a writ of certiorari is granted for compelling reasons, including, but not limited to, a United States court of appeals has entered a decision in conflict with the decision of another United States

court of appeals on the same important matter. Sup. Ct. R. 10.

Petitioner requests this Court grant certiorari to resolve a supposed conflict in the circuit courts. Pet. 10. Petitioner asserts that the Fifth Circuit's answer to the question of whether undistributed funds held by a Chapter 13 Trustee at time of conversion should be refunded to the debtor or disbursed to creditors is in direct conflict with the Third Circuit; and that it deepens the division of decisions of bankruptcy courts. Pet. 10.[1] However, the Third Circuit, despite being the only other circuit to address the issue of a Chapter 13 Trustee's right to disburse undistributed funds in his or her possession, rendered its decision with a confirmed plan wherein title to the debtor's property revested in the debtor on confirmation of the plan. *Michael II*, 699 F.3d at 309-310. Whereas, the same question decided by the Fifth Circuit involved a confirmed plan that specifically provided upon confirmation of the plan, all property of the estate shall not vest in the debtor, but shall remain property of the estate.

Petitioner asserts that "[t]he Third Circuit, presented with *nearly* identical facts in a case two years ago, reached the opposite conclusion from that reached by the court of appeals below." Pet. 10. Petitioner's use of the term "nearly" concedes that the

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[1] The Fifth Circuit acknowledges the question has divided courts for thirty years; and that only one other court of appeals has answered it. Pet. App. 2a-3a.

facts in *Michael II*, are almost, but not quite the same as the facts in the court of appeals' decision below. Indeed, Petitioner's characterization of a conflict in the circuit courts is misplaced. As stated, *supra*, the two circuit courts dealt with a fact significantly different as it relates to vesting of property of the estate. Respondent posits that Petitioner's arguments concerning the alleged importance of the question presented support a denial of certiorari. In sum, there is no circuit split.

The Third Circuit, in an opinion by Judge Ambro, relying heavily on 11 U.S.C. § 1327(b), held that a debtor in bankruptcy has a greater right to undistributed funds in the possession of the trustee than his creditors. *Michael II,* 699 F.3d at 313.

> In pertinent part, 11 U.S.C. § 1327 provides:
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Judge Ambro in *Michael II* explained:

> [P]roperty comes into and flows out of the estate. In the context of a Chapter 13 case, § 1327(b) vests all property of the Chapter 13

> estate in the debtor on confirmation of the plan. Thus when the debtor transfers funds to the Chapter 13 trustee to fulfill its obligations under a confirmed plan . . . the funds become part of the estate, and the debtor retains a vested interest in them. Though creditors have a right to those payments based on the confirmed plan, the debtor does not lose his vested interest until the trustee affirmatively transfers the funds to creditors.

Michael II, 699 F.3d at 313.

As so aptly noted by the court of appeals below, the decision of the Third Circuit ignored the exception of 11 U.S.C. § 1327(b), which is prefaced by the clause "except as otherwise provided in the plan or the order confirming plan." Pet. App. 19a.

In this case, the plan and the order confirming Debtor's plan is clear that all property of the Chapter 13 estate, including any income, earnings, or other property which may become part of the estate during the administration of the case, shall not revest in the debtor. Therefore, funds voluntarily paid by the Debtor (even from wages) until the point of conversion belong to the Chapter 13 estate and should be disbursed to the party with the greatest claim to them – Debtor's creditors.[2] It is only those funds paid

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[2] The Fifth Circuit acknowledged in footnote 8 of its opinion that the Respondent attempted to distinguish *Michael II* from the current case but noted that the order confirming the plan also stated the "property as may revest in the debtor shall so revest only upon further Order of the Court or upon dismissal,

(Continued on following page)

by a debtor post-conversion of his or her Chapter 13 case to Chapter 7 that should revert back to the debtor.

Further, and as explained by the court of appeals below:

> If the plan requires the debtor to make payments to the trustee that will be distributed to creditors, the debtor certainly does not retain possession of these payments. Likewise, it would seem that the confirmation order specifically divests the debtor of any interest he may have in the payments made to the trustee.

Pet. App. 19a-20a.

The court of appeals quoting in *In re Lennon*, 65 B.R. 130, 136 (Bankr. N.D. Ga. 1986) noted:

> [T]he debtor is bound to make the specified payment provided in the confirmed plan. These payments are specifically earmarked and set aside for distribution to creditors provided for by the confirmed plan. To the extent that the confirmed plan provides for payment from debtor's future earnings and the debtor actually makes payment to the trustee pursuant to that plan, the debtor is

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conversion, or discharge." Pet. App. 21a, n. 8. However, the Fifth Circuit found "it unnecessary to define with precision the property that 'may revest in the Debtor.' By requiring Harris to pay part of his wages to the trustee for distribution to creditors, the [confirmation] order clearly did not contemplate that such payments would revest in Harris." *Ibid.*

> not entitled to possession nor is the debtor vested with title to such payments. . . . [D]ebtor is to have no continuing interest in payments actually made pursuant to a confirmed plan.

Pet. App. 20a.

Because the two circuit courts that have addressed the issue dealt with a key fact significantly different in regard to property of the estate at confirmation and whether said property vests or does not vest with a debtor, the petition should be denied.

The alleged split between the Third and Fifth Circuits is superficial at best, and review by this Court at this time would be premature. Further, any reference that the issue has divided bankruptcy courts and district courts for "thirty years,"[3] is not sufficient for this Court to grant certiorari review. The infrequency of decisions issued by lower courts is worth consideration. The Fifth Circuit cited only twelve (12) cases dating from 1986 through 2001 for the majority position, which held funds should be distributed to creditors; and eight (8) cases dating from 1982 through 2010 for the minority position, which hold that funds should be distributed to a debtor. Pet. App. 2a, n. 1. In addition, the Fifth Circuit noted in its analysis of the minority position that: "[M]any of the earlier opinions in the latter category, after determining that the funds do not become part

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[3] Pet. App. 2a.

of the new Chapter 7 estate, did not go on to consider whether creditors may nonetheless be entitled to them under the old Chapter 13 plan." *Id.*

Denial of certiorari would allow time for full debate and consideration of other circuit courts. "[T]he likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'" *Brown v. Texas*, 522 U.S. 940, 118 S.Ct. 355, 357 (1997) (citing *McCray v. New York*, 461 U.S. 961, 962-963, 103 S.Ct. 2438, 2439 (1983)). Thus, without debate among the circuits, review at this time by the Court would be done without benefit of the circuits.

As stated, *supra*, the Fifth Circuit's decision is factually distinct from the Third Circuit. Contrary to Petitioner's description of a substantive circuit split, the Fifth Circuit is the only circuit to have analyzed the question within the scope of the exception to the general rule of 11 U.S.C. § 1327(b). The Fifth Circuit's interpretation is the only sensible construction considering the requisite facts.

Therefore, the arguments of Petitioner concerning the question presented support denial of certiorari in order to allow further consideration and debate amongst the circuit courts. An intolerable conflict is not created by the opinion issued by the court of appeals below.

III. The Fifth Circuit's Decision Is Sound And Well-Reasoned.

Petitioner asserts that the decision below is erroneous. Pet. 19. The Respondent respectfully disagrees. There is no error to correct. The Fifth Circuit's opinion is well reasoned and interprets the United States Bankruptcy Code in a logical fashion given the language of the Code, the context of the particular provisions at play, and congressional intent.

A. Section 348(f) does not terminate a Chapter 13 Trustee's responsibility to distribute funds in her possession to creditors.

Petitioner argues that returning undistributed funds in possession of the Trustee transmitted by the Debtor post-confirmation, but prior to conversion, follows the text of 11 U.S.C. § 348(f), which provides that unless a case is converted in bad faith from Chapter 13 to another chapter, property of the estate consists of property as of the date of the filing of the petition. Pet. 19. If converted in bad faith, property of the estate consists of property at time of conversion. 11 U.S.C. § 348(f)(2).

Prior to 1994, bankruptcy court decisions evidenced a split in authority as to the issue of whether or not the Chapter 7 Trustee is entitled to funds in the hands of the Chapter 13 Trustee in post confirmation conversion to Chapter 7 cases. Congress attempted to resolve this split of court decisions in 1994

by amending § 348(f) of the United States Bankruptcy Code. Pet. App. 6a-7a.

It is asserted by Petitioner that, as a result of the amendment to § 348(f), "the Chapter 13 estate that includes debtors' post petition wages terminates upon conversion, and the resulting Chapter 7 estate does not include those wages." Pet. 20. Petitioner further asserts that it would be illogical to conclude that funds not included in a Chapter 7 estate could still be disbursed to a debtor's creditors. *Id.*

"After the passage of § 348(f), it is clear that property acquired after the filing of a Chapter 13 petition, including wages, does not become part of the Chapter 7 estate upon conversion (absent bad faith)." However, and despite the amendment to 11 U.S.C. § 348(f), there still remains the question as to the proper disposition of money received by the Chapter 13 Trustee prior to and in the possession of the Chapter 13 Trustee as of the date of conversion of the case to a proceeding under Chapter 7. *Ibid. See also In re Hardin,* 200 B.R. 312, 313 (Bankr. E.D. Ky. 1996) (The Bankruptcy Court observed that while Congress clarified the disposition of funds between the Chapter 7 estate and the debtor in the 1994 amendments to the Bankruptcy Code, Congress did not directly address the rights that creditors in a Chapter 13 case have in funds provided through plan payments to a Chapter 13 Trustee that are still in the possession of the trustee when conversion of the case occurs post-confirmation.).

Respondent asserts it is not illogical or otherwise absurd to conclude that a debtor's wages could still be paid to creditors even if not part of a Chapter 7 estate upon conversion.

The court of appeals correctly noted the fact that the Chapter 13 Trustee does not retain control over assets in a converted Chapter 7 estate does not mean the Trustee loses control over assets outside of the Chapter 7 estate. Pet. App. 11a. "Even after termination of her services [Respondent] still has a responsibility to distribute remaining funds in her possession to the parties with the best claim to them." *Id.* Clearly, the court of appeals implies that the Trustee has a duty to "wind up" the administration of the confirmed plan post conversion, including a final distribution of funds on hand to creditors at time of conversion. Moreover, nothing in 11 U.S.C. § 348(e) establishes who, between Petitioner and his creditors, has the better claim to the monies in possession of the Trustee at time of conversion. *Id.*

B. Section 348(e) does not establish who, between Petitioner and his creditors, has the better claim to monies in possession of a Chapter 13 Trustee at time of conversion.

Respondent posits that 11 U.S.C. § 348(e), which terminates a trustee's services upon conversion, cannot be taken too literally. *See In re Parrish,* 275 B.R. 424, 430 (Bankr. D.D.C. 2002) (The Bankruptcy Court observed that § 348 is aimed at the practicality

that there cannot be two trustees administering the same estate and it should be interpreted narrowly thereby restricting it to the practical purposes it serves because Congress could not have intended termination of the Chapter 13 Trustee's services to clean up and finalize the administration of the Chapter 13 case.); *In re Redick,* 81 B.R. 881, 886 (Bankr. E.D. Mich. 1987) (noting that it is not true that the Chapter 13 Trustee ceases to be a Chapter 13 Trustee because then the Chapter 13 Trustee would not have a duty to render a final account pursuant to Fed. R. Bankr. P. 1019). *Accord, In re Pegues,* 266 B.R. 328, 336-337 (Bankr. D. Md. 2001) ("[I]t is clear that Congress intended that the chapter 13 trustee shall wind up the affairs of the chapter 13 estate including disbursing monies on hand to the appropriate recipient."). As noted by the Court in *In re Parrish, supra,* it is not the Chapter 7 Trustee that has a duty to disburse monies under the confirmed plan. As such, § 348 does not relieve the Chapter 13 Trustee of disbursing pre conversion monies paid by the Debtor and received by the Trustee to creditors. *In re Parrish,* 275 B.R. at 431. The court of appeals, quoting *In re Parrish*, 275 B.R. at 430 and *In re Redick*, 81 B.R. at 886, correctly stated that because the Trustee is holding funds belonging to another, she is in some sense still a trustee even if services were terminated. Pet. App. 10a.

Further, per the court of appeals, "it is clear that after conversion, the debtor's continuing obligation under the plan . . . cease; [h]owever it does not follow that the plan should thereafter be considered

retroactively undone in full, and no statutory authority supports such an interpretation." Pet. App. 13a.

As explained by the court of appeals below:

> [C]onversion does not eliminate the trustee's power and duty to wrap up certain affairs of the estate. Similarly, there is no reason why prospective termination of the plan necessarily prohibits the trustee from distributing the funds remaining in her possession – which were paid at a time when the plan *was* still in force, and the debtor was still obligated to make payments – pursuant to the plan.

Pet. App. 14a.

As further explained by the court below, quoting Judge Roth in his dissent in *Michael II*:

> [S]ince Congress intended for the trustee to perform several ancillary duties to clean-up and finalize the administration of the estate, . . . there is no logical reason why distribution of funds pursuant to the previously confirmed reorganization plan cannot be included as one of those administrative duties.

Pet. App. 11a.

It is not as Petitioner suggests that the Trustee's services are limited to a single ancillary duty to render a final report and account. Pet. 22. The Trustee's duties in "winding up" post conversion administration of the confirmed plan also include a final distribution to creditors of the funds voluntarily paid

by the Debtor.[4] Petitioner should have no expectation that monies paid to the Trustee would be returned to him simply because he chose to convert his case.

C. Petitioner does not have a greater right to undistributed funds in the possession of the Trustee than his creditors pursuant to 11 U.S.C. § 1327.

The Petitioner's reading of 11 U.S.C. § 1327 and *Michael II*'s interpretation of 11 U.S.C. § 1327; and argument of the Petitioner that the presumption in Chapter 13 is that he continues to maintain possession of property of the estate and his alleged vested interest in property of the estate, as it pertains to the facts in this case, is incorrect. *See* Pet. 23 and *Michael II*, 699 F.3d at 313. The Respondent asserts that the court of appeals below was correct in its analysis of 11 U.S.C. § 1327(b).

> If the plan requires the debtor to make payments to the trustee that will be distributed to creditors, the debtor certainly does not retain possession of these payments. Likewise, it would seem that the confirmation order specifically divests the debtor of any interest

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[4] Petitioner repeatedly refers to payments to the Trustee as a garnishment. The Petitioner's wages were not "garnished" in the sense of a seizure. It is the Petitioner, who, at the inception of his bankruptcy case, proposed a pay order be instituted to ensure that the voluntary payments proposed in his plan would, in fact, be paid.

> he may have in the payments made to the trustee.

Pet. App. 19a-20a.

As asserted by Respondent, and acknowledged by the Fifth Circuit, funds voluntarily paid by the Debtor prior to conversion for distribution pursuant to the confirmed plan were intended for the benefit of creditors and should be disbursed to the party with the greatest claim to them – creditors. These funds did not re-vest in the Debtor at time of confirmation. Pet. App. 21a. Any presumption that the Debtor continues to "possess" wages that he voluntarily relinquished for distribution to his creditors prior to conversion and pursuant to a confirmed plan is incorrect.[5]

Petitioner's reading that 11 U.S.C. § 1327(b), and as interpreted by *Michael II*, "is consistent with other provisions of the Bankruptcy Code that require the trustee to return funds to the debtor under other circumstances" is misplaced. Pet. 23.

First, 11 U.S.C. § 1326(a)(2) requires a trustee to retain a plan payment until confirmation or denial of confirmation. The circumstance Petitioner refers to is: if a plan is not confirmed, the trustee shall return the payment to debtor. That is not the case here. Petitioner's plan was confirmed.

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[5] *See* 11 U.S.C. § 1306(b).

Second, Petitioner ignores the clear exception to 11 U.S.C. § 349(b)(3).[6] Pet. 23-24. Petitioner incorrectly asserts, that if he had moved to dismiss his case pursuant to 11 U.S.C. § 349 as opposed to converting to Chapter 7, "there is no dispute that respondent would have refunded any undistributed funds to him under Section 349(b)(3)." Pet. 24. Petitioner's argument is erroneous.

Respondent would have "in the event of a dismissal," as she has in the past before the Bankruptcy Court,and on appeal, argued that funds in her possession at time of dismissal should be distributed to creditors as opposed to the Debtor.[7] A bankruptcy court has discretion to alter the presumptive revesting of property to a debtor upon dismissal of a case. *See* 11 U.S.C. § 349(b)(3). *See also In re Hamilton*, 493 B.R. 31, 44-46 (Bankr. M.D. Tenn. 2013) (The Bankruptcy Court noted because § 349(b) is prefaced with the phrase "unless the court, for cause, orders otherwise" bankruptcy courts have discretion to order that undistributed funds on hand with a trustee at time of dismissal do not revest in a debtor and that a debtor's creditors may have both a statutory and

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[6] 11 U.S.C. § 349(b)(3) provides that *unless the court, for cause orders otherwise*, a dismissal of a Chapter 13 case revest the property of the estate in the entity in which such property was vested immediately before the commencement of the case (emphasis added).

[7] *Clark v. Viegelahn*, No. SA-12-CA-979, Dkt. No. 7 (W.D. Tex. July 9, 2013); *In re Clark*, No. 10-51352, Dkt. No. 84 (Bankr. W.D. Tex. Aug. 2, 2012).

equitable basis for receiving said funds.); *In re Wiese*, 552 F.3d 584, 589-592 (7th Cir. 2009) (The Circuit Court held in a Chapter 12 case, the bankruptcy court's decision that there was cause for a confirmed plan to remain binding was within its discretion, e.g., reliance of the parties on the terms of the plan and interest of the creditors.); *In re Hufford*, 460 B.R. 172, 178 (Bankr. N.D. Ohio 2011) (In a case where debtor's confirmed plan required any funds in trustee's possession at time of dismissal be distributed to creditors, the Bankruptcy Court found that cause existed because debtors received the benefits of the bankruptcy code for an extended period of time and debtors should have expected that payments made while their bankruptcy case was pending should be allocated to their creditors pursuant to the terms of their plan.). Cause could exist for an outcome other than returning funds in the hands of the Trustee to a debtor in a dismissed case.

D. A debtor in bankruptcy would not be deterred from filing Chapter 13 if payments made under a plan would not be returned to the debtor if he or she chooses to convert to Chapter 7; and to hold otherwise may encourage abuse.

The decision below, particularly the Fifth Circuit's emphasis on considerations of policy and equity,[8] does

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[8] Pet. App. 22a-28a.

not produce a disincentive against a debtor continuing to proceed in Chapter 13 after a change in circumstances as Petitioner suggests. Pet. 24.

Petitioner further argues that the decision below provides a disincentive for attempting a repayment plan in Chapter 13 in the first place; and that debtors ought to feel confident that if a Chapter 13 case is not successful, or the goals of a debtor in a repayment plan cannot be met, that he or she can recover any undistributed payments in possession of the trustee at time of conversion. Pet. 25. To hold otherwise, as the Petitioner asserts, increases the risk that creditors will get "bonus" payments despite a conversion. *Id.* at 25-26. Petitioner fails to state that he may not have initially been eligible for a Chapter 7 proceeding as his annual income exceeded the median income and a presumption of abuse would have existed. In addition, the Petitioner's assertion that creditors will receive a "bonus" fails to consider that the creditors, secured and unsecured, have been without payment for extended periods of time.

As noted by the court of appeals, it is not likely that a debtor would be deterred by knowledge that voluntary payments made to a trustee in Chapter 13 would not be returned if a debtor chooses to convert to Chapter 7. Pet. App. 24a. Quoting *In re Bell*, 248 B.R. 236, 240 (Bankr. W.D.N.Y. 2000), the Fifth Circuit stated that such a rule "will not discourage any individuals from proceeding in Chapter 13, since it simply requires them to fully honor their obligation under a confirmed plan up to the point when they voluntarily wish to terminate the provisions of the

plan and have their case. . . . converted to a chapter 7 case." Pet. App. 24a. Any holding to the contrary would encourage debtors to convert (or dismiss) their Chapter 13 case when funds on hand with a Chapter 13 Trustee are high. Quoting the dissenting opinion in *Michael II*, 699 F.3d at 320, the court of appeals stated "if the undistributed funds revert to [the debtor], instead of being distributed to creditors in accordance with the plan's terms, [the debtor] would receive a windfall." This windfall would certainly promote abuse of the bankruptcy system.

As this Court expressed in *Hamilton v. Lanning*, 560 U.S. 505, 130 S.Ct. 2464 (2010), and *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 131 S.Ct. 716 (2011), the Congressional intent behind the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was to correct the perceived abuses of the consumer bankruptcy system, for debtors to repay creditors the maximum they can afford – "to help ensure that debtors who can pay creditors do pay them." *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. 716, 721, 725 (2011). In other words, BAPCPA was enacted to promote the rights of creditors. Therefore, the purpose of the Bankruptcy Code is not to allow a debtor to be rewarded for failing to observe a confirmed plan at the expense of his or her creditors. Bankruptcy was designed to give debtors a fresh start and place debtors and creditors in the best financial position at the conclusion of a case.

As acknowledged in the decision below, a debtor in bankruptcy is required to act in good faith in dealing with his or her creditors in exchange for the

protection and benefits afforded to him or her as a result of the filing of a bankruptcy. Pet. App. 26a-28a. In this case, Debtor received a benefit and protection until the point of conversion; and creditors are entitled to payment of monies voluntarily paid by the Debtor during the plan in exchange for the benefit he received.

In *In re O'Quinn,* the Bankruptcy Court held that the Chapter 13 Trustee should be ordered to disburse funds according to the terms of the debtor's plan, which represented pre conversion plan payments in the trustee's possession. *In re O'Quinn,* 143 B.R. 408, 413-414 (Bankr. S.D. Miss. 1992). The *O'Quinn* Court, in balancing the competing interests of the debtors and creditors, looked to the overall purposes of the bankruptcy code and observed:

> [T]he Debtors retained possession of and continued to use certain property that was security for certain of their debts. This is typical of most chapter 13 cases. The security normally consists of such items as automobiles, homes and household goods and furnishings. The secured lenders are prohibited from taking possession of their property because the debtor has a confirmed plan which proposes to pay them each month. It appears to this Court to be patently unfair to allow a debtor to drive and depreciate an automobile, occupy a home or use household goods based on a promise to his creditors in the form of a court approved plan, and then allow the debtor to snatch away the monies

> which the trustee is holding to make the payments, but has not yet disbursed, by allowing the debtor to pick an opportune time to convert.

Id. at 413.

The court of appeals was correct in deciding that the Debtor, post conversion, should not be permitted to receive undistributed payments in the Trustee's possession after voluntarily making those payments. Debtor forfeited his rights to those monies upon payment to the Trustee. "Conversion does not retroactively alter this arrangement and undo the benefits the debtor received from the plan." Pet. App. 27a (quoting *Michael II*, 699 F.3d at 320 n. 8 (Roth, J., dissenting)). Once the Debtor voluntarily made payments to the Trustee pursuant to his obligations under the confirmed plan, he relinquished all rights in those payments.

CONCLUSION

For the foregoing reasons, review by the Court is unnecessary. Respectfully, Respondent asserts the Petition for Writ of Certiorari should be denied.

Respectfully Submitted.

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November 2014

No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent contends that the Fifth Circuit's decision is interlocutory, distinguishable, underdeveloped, and correct. It is none of the four.

1. The Fifth Circuit's decision finally and conclusively reversed the district court's final order. That order had affirmed the bankruptcy court's final order directing respondent to pay petitioner. There is nothing remotely "interlocutory" (Opp. 5) about the decision below. Nor does the Fifth Circuit's inclusion of boilerplate language indicating that, in addition to reversing, it was remanding "for further proceedings consistent with this opinion" (Pet. App. 28a) leave any doubt about the outcome on remand or undermine the finality of the Fifth Circuit's decision.[1]

2. Contrary to respondent's suggestion, this case is *not* distinguishable from the Third Circuit's decision in *In re Michael*, 699 F.3d 305 (2012). As the Fifth Circuit recognized, the Third Circuit "squarely answered" the purely legal question presented here and reached the opposite conclusion. Pet. App. 2a–3a & n.2.

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[1] Even in cases arising from the state courts, in which this Court's review is more closely circumscribed, a decision is "final and reviewable when it end[s] the litigation by fully determining the rights of the parties." *Dep't of Banking, State of Neb.* v. *Pink*, 317 U.S. 264, 267 (1942) (per curiam). Such finality occurs notwithstanding that a decision has been remanded for "the ministerial act of entering the judgment which the appellate court ha[s] directed." *Ibid.*

Respondent contends (Opp. 7–12), however, that a "significantly different" fact in the two cases makes all the difference: The plan and confirmation order in *Michael* re-vested the property of the estate in the debtor upon *plan confirmation* (699 F.3d at 309–10), whereas the plan and confirmation order in this case re-vested the property of the estate in petitioner upon his *conversion to Chapter 7* (Pet. App. 21a n.8). But that distinction has no bearing on the question presented here. Indeed, the Fifth Circuit expressly rejected respondent's "attempt[] to distinguish" the two cases on this basis. *Ibid.*

At bottom, the question in both cases is what should become of undistributed funds still held by the Chapter 13 trustee *after conversion* to Chapter 7. In this case—and in *Michael*—the "property of the estate" had re-vested in the debtor by the time, post-conversion, that the trustee disbursed funds to creditors. It is neither here nor there that the re-vesting happened *earlier* in *Michael* than it did in this case. What matters is that re-vesting happened in both cases before the trustee made the challenged distribution.

The Fifth and Third Circuits' disagreement about Section 1327(b) has nothing to do with that immaterial difference in timing. The Third Circuit held that the property of the estate that re-vests in a Chapter 13 debtor under Section 1327(b) *includes* post-petition wages that the debtor has paid to the trustee but that have not been distributed to creditors. *In re Michael*, 699 F.3d at 310. Regardless of when the re-vesting happens in a particular case, the Third Circuit concluded (*ibid.*) that the undistributed funds are "under the control of the

debtor on the date of conversion" for the purpose of determining the "property of the estate in the converted case" (11 U.S.C. § 348(f)(1)(A)). See also 699 F.3d at 313 ("Because § 1327(b) vests all property of the Chapter 13 estate in the debtor, including any post-petition property held by the Chapter 13 trustee *at the time of conversion* (such as funds transferred to the estate for eventual distribution to creditors), *on conversion* property of the Chapter 13 estate usually is 'under the control of the debtor.'") (emphasis added).

The Third Circuit's decision "ultimately turn-[ed]" (699 F.3d at 308), therefore, on Section 348(f)'s exclusion from the converted estate of post-petition property in the debtor's control "[e]xcept" where the conversion was done "in bad faith" (11 U.S.C. § 348(f)). "Overall," the court held, "a textual reading of § 348(f), particularly in light of its legislative history, leads us to conclude that undistributed plan payments held by a Chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith." *In re Michael*, 699 F.3d at 316.

The Fifth Circuit, by contrast, held that a debtor's payments to a trustee pursuant to a Chapter 13 plan *never* re-vest in a debtor under Section 1327(b)—not at confirmation, at conversion, or otherwise. Pet. App. 18a–21a. Section 1327(b)'s re-vesting applies "[e]xcept as otherwise provided in the plan or order confirming the plan," and the Fifth Circuit concluded that the Third Circuit "err[ed] by ignoring" this caveat. *Id.* at 19a. The Fifth Circuit held that payments a debtor makes to a Chapter 13 trustee pursuant to a confirmed plan are "otherwise

provided" for by the plan and confirmation order and "specifically divest[ed]" by the debtor. *Id.* at 19a–20a.

Those conflicting conclusions are agnostic as to *when* any re-vesting happens; the dispute is about *what* re-vests. Accordingly, the Fifth Circuit rejected respondent's "attempt[] to distinguish" *Michael* based on a difference in the timing of re-vesting. Pet. App. 21a n.8. In the Fifth Circuit's view of the law—in clear conflict with the Third Circuit's conclusion in *Michael*—"[b]y requiring [petitioner] to pay part of his wages to [respondent] for distribution to creditors, the [confirmation] order clearly did not contemplate that such payments would revest in [petitioner]." *Ibid.*

Tellingly, when respondent tries to defend the merits of the decision below, she is compelled to contend that "*Michael II*'s interpretation of 11 U.S.C. § 1327 * * * is incorrect" whereas "the court of appeals below was correct in its analysis of 11 U.S.C. § 1327(b)." Opp. 18. Even respondent ultimately cannot get around the acknowledged, clear division between the courts of appeals.[2]

3. Respondent does not dispute the Fifth Circuit's acknowledgement that this issue "has divided bankruptcy courts and district courts for 'thirty years.'" Opp. 11 (quoting Pet. App. 2a). Nor does respondent deny that the question presented

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[2] Similarly, respondent does not disagree that the Fifth Circuit's decision effectively conflicts with the Ninth Circuit's holding that undistributed funds must be returned to a debtor who converts from Chapter 12 to Chapter 7. Pet. 14 & n.2 (citing cases).

arises frequently in the "common circumstance" in which a Chapter 13 debtor converts to Chapter 7. *In re Michael*, 699 F.3d at 306; see also Pet. 28–30. Indeed, respondent does not deny that the post-conversion disposition of funds is a recurring and important issue in the roughly 60,000 annual conversions from Chapter 13 to Chapter 7. See Pet. 28–30. Those conversions operate in the shadow of this conflict, even if they do not necessarily result in litigated decisions.

In response to the pervasive confusion created by the patchwork of conflicting decisions in the lower courts, the Department of Justice, which has recognized that "[c]ourts are divided" on the question presented here, has instructed Chapter 13 trustees to "follow legal authority in the jurisdiction" in which each debtor's case is proceeding. U.S. Dep't of Justice, Exec. Office for U.S. Trustees, *Handbook for Chapter 13 Standing Trustees* 3-36 (Oct. 1, 2012). Delaying review would ensure only that perhaps tens of thousands of cases—directly affecting the lives and pocketbooks of thousands of real people—will be decided by the happenstance of where they reside. That is hardly the "uniform" rule of bankruptcy envisioned by the Constitution.

Respondent nevertheless contends that it would be "premature" for this Court to resolve the issue. Opp. 11. Respondent's principal complaint is that the Fifth Circuit cited "only" 20 lower-court decisions (split 12–8) addressing the issue. *Ibid.* According to respondent, those 20 decisions demonstrate an "infrequency of decisions" counseling against certiorari. *Ibid.* Not so. Twenty reported decisions, spanning three decades, are more than enough to

show that the issue routinely arises in converted cases and has been analyzed and re-analyzed by the lower courts.

What is more, respondent never addresses *petitioner's* cited decisions. See Pet. 17–18 nn. 3 & 4. Petitioner cited 25 lower-court decisions in which courts have squarely addressed (and disagreed over) the question presented. *Ibid.* In response to the Fifth Circuit's observation (Pet. App. 2a n.1) that some early decisions did not *expressly* resolve the ultimate disposition of funds that were not included in the converted Chapter 7 estate (doing so instead by implication), petitioner conservatively excluded such cases from his collected citations. If the Fifth Circuit's and petitioner's citations are combined, however, the result is a list of 32 decisions addressing the question presented that split 17–15. Likewise, by ignoring petitioner's citations entirely, respondent also ignores the five lower courts (excluding those in this case) that have decided the question presented in just the two years since the Third Circuit decided *Michael*. Those recent decisions likewise split 3–2. Pet. 18.

In short, more than enough ink has been spilled by the lower courts in trying—and failing—to resolve the legal issue presented for review in this case. Three decades of judicial consideration have left no stone unturned in analyzing this "pure question of law." *In re Michael*, 699 F.3d at 308. Nothing requires "further study" (Opp. 12) in the lower courts. And, as we explained in the petition (and respondent does not dispute), reported decisions are just the tip of a very large iceberg. The disputed sum in any given case—although incredibly meaningful to

the individual debtor who is seeking a fresh financial start—is routinely not large enough to justify bankruptcy-court litigation and three layers of appellate review. Pet. 18. This case thus provides an excellent vehicle to resolve a pure legal question that has long vexed the lower courts, but that debtors are rarely able to present for this Court's review.

4. Respondent devotes most of her brief to a misguided defense of the merits of the decision below. Indeed, her open embrace of the Fifth Circuit's most glaring error—*i.e.*, that court's conclusion that the statute should not be read "too literally"—only underscores the urgent need for this Court's review.

a. Respondent first argues that Section 348(f) allows a Chapter 13 trustee's payment of a debtor's undistributed wages to his creditors *after* he converts to Chapter 7 in good faith. Opp. 13–15. Section 348(f), however, provides that undistributed wages are off-limits to creditors post-conversion through the Chapter 7 estate, "[e]xcept" when a case has been converted in "bad faith." There is patent illogic to the Fifth Circuit's conclusion that those funds can nevertheless be paid out to the same creditors by the former Chapter 13 trustee even after a case has been converted *in good faith* (as it is undisputed happened here). See Pet. 19–21. "Except" means "except": there is no valid basis for courts to add exceptions to those expressly and exclusively identified by Congress in the text of a statute.

Therein lies the critical legal dispute between the Third and Fifth Circuits. In *Michael*, the Third Circuit held that "a textual reading of § 348(f), particularly in light of its legislative history, leads us

to conclude that undistributed plan payments held by a Chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith." 699 F.3d at 316. Its decision "ultimately turn[ed]" on that construction of Section 348(f). *Id.* at 308. The Fifth Circuit, by contrast, held that the Third Circuit's "argument fails to recognize" a competing understanding of Section 348(f). Pet. App. 21a. Tellingly, however, respondent does not actually defend the flawed "non-superfluity" reasoning on which the Fifth Circuit rejected the Third Circuit's reading of the statute. See Pet. 20–21 (citing Pet. App. 21a–22a).

b. Respondent (Opp. 15), like the Fifth Circuit (Pet. App. 10a), asks this Court not to take "too literally" Section 348(e)'s text, which terminates a Chapter 13 trustee's services upon conversion. But, as the Third Circuit recognized in *Michael* (699 F.3d at 310), Section 348(e) must be afforded its plain and ordinary meaning—as "literally" as possible. As the Third Circuit explained, when Section 348(e) "terminates the services" of the Chapter 13 trustee upon conversion, it "renders [the trustee] powerless to make payments to creditors under a Chapter 13 plan." *Ibid.*; see also Pet. 21–22.

In the Fifth Circuit's view, paying undistributed funds to creditors as though the Chapter 13 plan were still in force is simply part of the trustee's obligation to "wind[] up" the Chapter 13 estate. Opp. 17. That is a bridge too far. A Chapter 13 trustee's post-conversion ancillary duties are specific and narrow. See Federal Rule of Bankruptcy Procedure 1019(4) (requiring turnover of records and property of the estate to the Chapter 7 trustee), 1019(5)

(requiring a final report and schedule of post-petition debts). If Section 348(e) "terminates" the trustee's ability to do anything, then certainly it must terminate her authority to continue disbursing funds to a debtor's Chapter 13 creditors.

c. Respondent takes issue with our identification of two ways in which the Third Circuit's interpretation of Section 1327(b) is more consistent with other Code provisions than the Fifth Circuit's. See Pet. 23–24. The first way is that a trustee must refund undistributed funds to a debtor who converts his case *before* plan confirmation. 11 U.S.C. § 1326(a)(2). It stands to reason that Congress intended the same rule to apply in cases converted *after* plan confirmation. See Pet. 23. Respondent provides no justification for the Fifth Circuit's inconsistent treatment of the two scenarios; she simply (and non-responsively) observes that this case does not involve a pre-confirmation conversion. Opp. 19.

The second way the Third Circuit's rule aligns with other Bankruptcy Code provisions is that a case *converted* after confirmation should not be treated differently from a case *dismissed* after confirmation. See Pet. 23–24 (citing 11 U.S.C. § 349(b)(3)). As the Third and Ninth Circuits have concluded, it "elevate[s] form over substance" to hold otherwise. *In re Michael*, 699 F.3d at 313 n.6; *Arkison* v. *Plata (In re Plata)*, 958 F.2d 918, 922 (9th Cir. 1992). Respondent claims that this comparison "ignores" the dismissal statute's "exception" for cases where a court finds "cause" not to return property of the estate to the debtor upon dismissal. Opp. 20–21 & n.6. But that "exception" merely confirms the validity

of petitioner's comparison: to disburse undistributed funds to creditors after conversion or dismissal, a trustee must show "bad faith" or "cause," respectively. Compare 11 U.S.C. § 348(f) (conversion) with *id.* § 349(b) (dismissal). In the absence of such a showing, the default rule should be the same: the undistributed funds are refunded to the debtor.

d. Finally, Respondent disputes (without success) that the decision below, if permitted to stand, would create perverse incentives for debtors and negative consequences for creditors. For debtors already proceeding in Chapter 13, however, the Fifth Circuit's rule compels them to convert out of Chapter 13 quickly once their circumstances have changed. Pet. 26–27. Respondent purports to disagree, but provides no basis for her disagreement. Opp. 21–22. As for a debtor considering a Chapter 13 proceeding in which success is unsure, he must consider any risk that post-petition wages that would be off-limits to his creditors in Chapter 7 would still be disbursed to those creditors even after Chapter 13 has proven unsuccessful. Pet. 27–28. That risk, which the decision below creates, favors proceeding in Chapter 7 in the first instance. Respondent argues that no disincentives are established because Chapter 13 debtors are just "honor[ing] their obligation[s]" if such post-conversion distributions are allowed to occur, but that merely begs the question. Opp. 22–23.

Respondent also mistakenly contends that debtors such as petitioner would receive a "windfall" if they were to recover post-petition wages undistributed at conversion. Opp. 22–25. Such rhetoric is not premised on fact. In this case, for example, respondent held funds at conversion

because the plan required her to withhold payments earmarked for petitioner's mortgagor once it received relief from the stay to foreclose on petitioner's home. If petitioner's unsecured creditors had believed they were entitled to those funds *during* the proceedings, they could have moved to modify the plan. See 11 U.S.C. § 1329. No creditor did so. The notion that those creditors are nevertheless entitled to funds post-conversion as a *quid pro quo* is unfounded.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[3] Respondent relies (Opp. 23) on the purported "Congressional intent behind the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)." That statute, however, made no relevant change to Section 348, and respondent points to no other BAPCPA provision that relates to the question presented.

No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

JOINT APPENDIX

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NOTICE

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the Appendix to Petition for a Writ of Certiorari filed on October 6, 2014, by Petitioners in Case No. 14-400.

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APPENDIX A

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS

Case No. 10-50655C

In re:

CHARLES E. HARRIS, III,
Debtor.

RELEVANT DOCKET ENTRIES

Date	#	Docket Text
02/24/10	1	Voluntary Petition under Chapter 13 With Schedules, With Statements, (Filing Fee: $ 274) filed by Charles E. Harris III. -Declaration for Electronic Filing due by 03/3/2010 (Malaise, J.)
02/24/10	2	Chapter 13 Plan filed by Charles E. Harris III. (Malaise, J.)
02/24/10	3	Certificate of Budget and Credit Counseling-First Debtor filed by Charles E. Harris III. (Malaise, J.)
02/25/10	4	Order to Employer of Debtor to Pay the Trustee. (Luna, Emilio)

03/01/10	—	Resignation of Trustee Cameron and Notice of Appointment of Chapter 13 Standing Trustee Mary K. Viegelahn. (Viegelahn, Mary)
03/03/10	7	341 Meeting of Creditors. First Meeting Set For 3/31/2010 at 01:15 PM at San Antonio Room 434 Objections to Dischargeability of debt due 5/31/2010- Confirmation Hearing Set For 5/6/2010 at 10:30 AM at SA Courtroom 1- Proofs of Claim Due 6/29/2010. (Viegelahn20, Mary)
04/01/10	—	Chapter 13 Trustee's 341 Proceeding Memo: (341 Meeting Concluded). (Viegelahn10, Mary)
04/07/10	11	Financial Management Course Certificate - First Debtor Only filed by J. Todd Malaise02 for Debtor Charles E. Harris III. (Malaise02, J.)
04/13/10	12	Trustee's Chapter 13 Plan Recommendation Concerning Confirmation of Debtor's Plan of Reorganization. (Plan Confirmation Recommended.). (Viegelahn10, Mary)
04/15/10	13	Order Confirming Chapter 13 Plan (Order entered on 4/15/2010) (Chapa, Beth)
06/04/10	16	Motion for Relief from Stay *(15 Day Objection Language)* (Filing Fee: $ 150.00) filed by Alan R. Scheinthal for Creditor Wells Fargo

		Dealer Services, Inc. fka Wachovia Dealer Services, Inc. (Attachments: 1 Exhibit Contract2 Exhibit Title)(Scheinthal, Alan)
06/07/10	17	**Hearing to Consider and Act Upon the Following:** (Related Document(s): 16 Motion for Relief from Stay *(15 Day Objection Language)* (Filing Fee: $ 150.00) filed by Alan R. Scheinthal for Creditor Wells Fargo Dealer Services, Inc. fka Wachovia Dealer Services, Inc. (Attachments: # 1 Exhibit Contract# 2 Exhibit Title)(Scheinthal, Alan)) Hearing Scheduled For 6/21/2010 at 09:30 AM at SA Courtroom 1 (Briones, Rosie)
06/10/10	19	Response Filed by J. Todd Malaise for Debtor Charles E. Harris III (Malaise, J.) (related document(s): 16 Motion for Relief from Stay *(15 Day Objection Language)* (Filing Fee: $ 150.00) filed by Alan R. Scheinthal for Creditor Wells Fargo Dealer Services, Inc. fka Wachovia Dealer Services, Inc. (Attachments: # 1 Exhibit Contract# 2 Exhibit Title)(Scheinthal, Alan))
06/21/10	20	Order Regarding (related document(s): 16 Motion for Relief from Stay *(15 Day Objection Language)* (Filing Fee: $ 150.00) filed by Alan R. Scheinthal for

		Creditor Wells Fargo Dealer Services, Inc. fka Wachovia Dealer Services, Inc. (Attachments: # 1 Exhibit Contract# 2 Exhibit Title)(Scheinthal, Alan)) (Order entered on 6/21/2010) (Paez, Daniel)
06/21/10	—	Hearing Held. 16 Motion for Relief from Stay filed by Alan R. Scheinthal for Creditor Wells Fargo Dealer Services, Inc. fka Wachovia Dealer Services, Inc: AGREED ORDER SUBMITTED ON 6/16/2010. (Luna, Emilio) (Entered: 06/30/2010)
10/13/10	22	Motion for Relief from Stay Of Action Against Debtor Regarding Property Located At 4807 Orchid Star, San Antonio, Texas 78218 (30 Day Waiver Language) *(14 Day Objection Language)* (Filing Fee: $150.00) filed by Kadra D. Alexander for Creditor Chase Home Finance LLC (Attachments: #(1) Affidavit with payment history #(2) Affidavit Certificate of Service #(3) Exhibit Note #(4) Exhibit Deed of Trust) (Alexander, Kadra) Modified on 10/14/2010 (Castleberry, Deanna).
10/14/10	23	**Hearing to Consider and Act Upon the Following:** (Related Document(s): 22 Motion for Relief from Stay Of Action Against Debtor Regarding Property Located At 4807

		Orchid Star, San Antonio, Texas 78218 (30 Day Waiver Language) *(14 Day Objection Language)* (Filing Fee: $150.00) filed by Kadra D. Alexander for Creditor Chase Home Finance LLC (Attachments: #(1) Affidavit with payment history #(2) Affidavit Certificate of Service #(3) Exhibit Note #(4) Exhibit Deed of Trust)(Alexander, Kadra) Hearing Scheduled For 11/8/2010 at 9:30 AM at SA Courtroom 1 (Castleberry, Deanna)
10/18/10	25	Response Filed by J. Todd Malaise02 for Debtor Charles E. Harris III (Malaise02, J.) (related document(s): 22 Motion for Relief from Stay Of Action Against Debtor Regarding Property Located At 4807 Orchid Star, San Antonio, Texas 78218 (30 Day Waiver Language) *(14 Day Objection Language)* (Filing Fee: $150.00) filed by Kadra D. Alexander for Creditor Chase Home Finance LLC (Attachments: #(1) Affidavit with payment history #(2) Affidavit Certificate of Service #(3) Exhibit Note #(4) Exhibit Deed of Trust) (Alexander, Kadra) Modified on 10/14/2010 (Castleberry, Deanna).)
11/08/10	—	Hearing Held. 22 Motion for Relief from Stay of Action Against Debtor Regarding Property Located at 4807 Orchid Star, San Antonio, Texas

78218 filed by Kadra D. Alexander for Creditor Chase Home Finance LLC: AGREED ORDER. (Luna, Emilio) (Entered: 11/18/2010)

11/09/10 26 Order Regarding (related document(s): 22 Motion for Relief from Stay Of Action Against Debtor Regarding Property Located At 4807 Orchid Star, San Antonio, Texas 78218 (30 Day Waiver Language) *(14 Day Objection Language)* (Filing Fee: $150.00) filed by Kadra D. Alexander for Creditor Chase Home Finance LLC (Attachments: #(1) Affidavit with payment history #(2) Affidavit Certificate of Service #(3) Exhibit Note #(4) Exhibit Deed of Trust)(Alexander, Kadra) Modified on 10/14/2010 (Castleberry, Deanna).) (Order entered on 11/9/2010) (Luna, Emilio)

11/12/10 28 Order Regarding (related document(s): 22 Motion for Relief from Stay Of Action Against Debtor Regarding Property Located At 4807 Orchid Star, San Antonio, Texas 78218 (30 Day Waiver Language) *(14 Day Objection Language)* (Filing Fee: $150.00) filed by Kadra D. Alexander for Creditor Chase Home Finance LLC (Attachments: #(1) Affidavit with payment history #(2) Affidavit Certificate of Service #(3) Exhibit Note #(4) Exhibit Deed of

		Trust)(Alexander, Kadra) Modified on 10/14/2010 (Castleberry, Deanna).) (Order entered on 11/12/2010) (Paez, Daniel)
11/21/11	30	Notice of Voluntary Conversion, Chapter 13 to 7. (Filing Fee: $ 25.00) filed by J. Todd Malaise for Debtor Charles E. Harris III. (Malaise, J.)
11/21/11	31	Amended Petition filed - Amendment(s): to correct address, Amended Schedules and Summary After Conversion, Disclosure of Compensation by Attorney for Debtor, Individual Debtor Statement of Intentions filed by J. Todd Malaise for Debtor Charles E. Harris III. -Declaration for Electronic Filing due by 11/28/2011 Declaration for Electronic Filing due by 11/28/2011 (Malaise, J.)
11/22/11	32	Convert Case from Chapter 13 to Chapter 7. (Mary K Viegelahn removed from the case.) Added Trustee Jose C Rodriguez, First Meeting of Creditors & Notice of Appointment of Interim Trustee Jose C Rodriguez, with 341 (a) meeting to be held on 12/22/2011 at 10:00 AM at San Antonio Room 333. Objections for Discharge due by 02/20/2012. (Luna, Emilio).
11/30/11	34	Trustee's Claims Recommendation

		(30 Day Objection Language). (Viegelahn, Mary)
12/05/11	36	Trustee's Final Report and Account, Chapter 13 Case. (Viegelahn, Mary)
12/23/11	—	Chapter 7 Trustee's Report of No Distribution: I, Jose C Rodriguez, having been appointed trustee of the estate of the above-named debtor(s), report that I have neither received any property nor paid any money on account of this estate; that I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law. Pursuant to Fed R Bank P 5009, I hereby certify that the estate of the abovenamed debtor(s) has been fully administered. I request that I be discharged from any further duties as trustee. **Section 341 Meeting held on 12/22/11.** Key information about this case as reported in schedules filed by the debtor(s) or otherwise found in the case record: This case was pending for 1 months. Assets Abandoned (without deducting any secured claims): $ 89600.00, Assets Exempt: $ 12453.09, Claims Scheduled: $ 177730.00, Claims Asserted: Not

		Applicable, Claims scheduled to be discharged without payment (without deducting the value of collateral or debts excepted from discharge): $ 177730.00. Debtor appeared. (Rodriguez, Jose)
12/29/11	38	Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III(Malaise, J.)
01/03/12	39	**Hearing to Consider and Act Upon the Following:** (Related Document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) Hearing Scheduled For 2/7/2012 at 10:30 AM at SA Courtroom 1 (Elizondo, Lisa)
01/12/12	41	Supplemental Certificate of Service filed by J. Todd Malaise for Debtor Charles E. Harris III. (Malaise, J.) (Related Document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III)
02/14/12	—	Hearing Held: GRANTED FOR REASONS STATED ON THE RECORD. Order due from Steve Cennamo by 2/28/2012. (Related Document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III). (Luna, Emilio) (Entered: 02/16/2012)

02/15/12	42	Exhibit and Witness List for Hearing Held on February 14, 2012, (Related Document(s): 38-Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III). (Luna, Emilio) (Entered: 02/16/2012)
02/23/12	43	Order Discharging Debtor(s) (Admin.)
02/29/12	45	Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012) (Luna, Emilio)
03/05/12	49	Notice of Appeal filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Filing Fee: $298.00) (Viegelahn17, Mary), Appellant Designation due by 03/19/2012, (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012))
03/13/12	52	Transcript regarding Hearing Held 02/14/12 THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 06/11/2012.

Until that time the transcript may be viewed at the Bankruptcy Court or a copy may be obtained from the official court transcriber. Transcriber Darla Messina, Telephone number 210-340-6464. - NAME OF PURCHASER: Ms. Vanessa DeLeon Guerrero. Notice of Intent to Request Redaction Deadline Due By 03/20/2012. Redaction Request Due By04/3/2012. Redacted Transcript Submission Due By 04/13/2012. Transcript access will be restricted through 06/11/2012. (Flores, Jennifer)

03/27/12 54 Motion to Compel Trustee to Comply with Court Order filed by J. Todd Malaise for Debtor Charles E. Harris III(Malaise, J.) (Related Document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012)) Modified on 4/12/2012 (Sanchez, Cindy).

04/05/12 55 Appellant's Designation of Contents and Issues For Inclusion In Record On Appeal Filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Viegelahn17, Mary) Record Transmission due on 05/7/2012, (related document(s): 49 Notice of Appeal Filed by Mary K.

		Viegelahn17 for Trustee Mary K Viegelahn (Filing Fee:$ 298.00) (Viegelahn17, Mary) -Appellant Designation due by 03/19/2012 (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012)))
04/05/12	56	Trustee's Appellant's Statement of Issues (Viegelahn17, Mary) (related document(s): 49 Notice of Appeal Filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Filing Fee:$ 298.00) (Viegelahn17, Mary) - Appellant Designation due by 03/19/2012 (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012)))
04/09/12	57	Trustee's Motion for Stay Pending Appeal (Viegelahn17, Mary), (related document(s): 49 Notice of Appeal filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III)))

04/09/12	58	Response filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Viegelahn17, Mary), (related document(s): 54 Motion to Compel Trustee to Comply with Court Order *(14 Day Objection Language)* filed by J. Todd Malaise for Debtor Charles E. Harris III(Malaise, J.) (Related Document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012)))
04/10/12	—	Hearing to Consider and Act Upon the Following: (Related Document(s): 57 Trustee's Motion for Stay Pending Appeal (Viegelahn17, Mary) (related document(s): 49 Notice of Appeal Filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Filing Fee:$ 298.00) (Viegelahn17, Mary) -Appellant Designation due by 03/19/2012 (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012)))) Hearing Scheduled For 4/12/2012 at 09:30 AM at SA Courtroom 1 (Gutierrez, Joyce) ***SET ON EXPEDITED BASIS PER THE COURT'S

DIRECTION, TRUSTEE IS RESPONSIBLE FOR NOTICE***

04/12/12 Hearing Held: GRANTED WITH CONDITIONS, WITH PLACING A BOND IN THE AMOUNT OF $10,000.00, BOND TO POST IN 14 DAYS. Order due from Vienna Gerlach by 4/26/2012. (Related Document(s): 57 Trustee's Motion for Stay Pending Appeal). (Luna, Emilio) (Entered: 04/13/2012)

04/13/12 60 Trustee's Court Bond on Appeal (Viegelahn17, Mary) (related document(s): 57 Trustee's Motion for Stay Pending Appeal (Viegelahn17, Mary), (related document(s): 49 Notice of Appeal filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III))))

04/18/12 61 Appellee's Designation of Contents and Issues For Inclusion In Record On Appeal Filed by J. Todd Malaise for Debtor Charles E. Harris III (Malaise, J.) (related document(s): 49 Notice of Appeal filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Filing Fee: $298.00) (Viegelahn17, Mary), Appellant Designation due by 03/19/2012,

(related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012)))

04/20/12 62 Order Regarding (related document(s): 57 Trustee's Motion for Stay Pending Appeal (Viegelahn17, Mary), (related document(s): 49 Notice of Appeal filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III)))) (Order entered on 4/20/2012) (Luna, Emilio)

04/26/12 64 Amended Appellant's Designation of Contents and Issues For Inclusion In Record On Appeal Filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Viegelahn17, Mary) Record Transmission due on 05/29/2012, (related document(s): 49 Notice of Appeal filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Filing Fee: $298.00) (Viegelahn17, Mary), Appellant Designation due by 03/19/2012, (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds

filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012)), 55 Appellant's Designation of Contents and Issues For Inclusion In Record On Appeal Filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Viegelahn17, Mary) Record Transmission due on 05/7/2012, (related document(s): 49 Notice of Appeal Filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (Filing Fee:$ 298.00) (Viegelahn17, Mary) -Appellant Designation due by 03/19/2012 (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III) (Order entered on 2/29/2012))))

05/31/12 65 Transmission of Record on Appeal to District Court (Luna, Emilio), (related document(s): 49 Notice of Appeal filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III)))

09/25/12 67 Notice of Docketing District Court Record Regarding Appeal, Civil Action Number: SA-12-CV-540-FB,

(related document(s): 49 Notice of Appeal filed by Mary K. Viegelahn17 for Trustee Mary K Viegelahn (related document(s): 45 Order Regarding (related document(s): 38 Motion to Compel Return of Funds filed by J. Todd Malaise for Debtor Charles E. Harris III))). (Luna, Emilio). (Entered: 09/27/2012)

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

Case No. 5:12-CV-00540-DAE

In re:

CHARLES E. HARRIS, III,
Debtor.

MARY K. VIEGELAHN,
Appellant,

v.

CHARLES E. HARRIS, III,
Appellee.

RELEVANT DOCKET ENTRIES

Date	#	Docket Text
05/31/12	1	Certificate of transmission of Bankruptcy on Appeal. The following record on appeal being that of Mary K. Viegelahn, Chapter 13 Trustee, of the Order Compelling Return of Funds entered on February 29, 2012 Bankruptcy Court case number 10-50655-lmc, filed by Mary K. Viegelahn. (Attachments: # 1 List of Parties, # 2 Bankruptcy Docket Sheet, # 3

		Bankruptcy Pleadings, # 4 Binder (placed in file room), # 5 Civil Cover Sheet)(tr1) (Entered: 06/01/2012)
06/01/12	2	Notice of Docketing Bankruptcy Appeal. Appellant Brief due by 6/15/2012. (tr1) (Entered: 06/01/2012)
07/26/12	6	Appellant's BRIEF by Mary K. Viegelahn. (Guerrero, Vanessa) (Entered: 07/26/2012)
09/24/12	9	Appellee's BRIEF by Charles E. Harris, III. (Cennamo, Steven) (Entered: 09/24/2012)
10/09/12	10	Appellant's REPLY BRIEF by Mary K. Viegelahn. (Guerrero, Vanessa) (Entered: 10/09/2012)
10/29/12	11	MOTION to supplement re 9 Appellee's Brief by Charles E. Harris, III. (Attachments: # 1 Supplement)(Cennamo, Steven) (Entered: 10/29/2012)
10/31/12	12	ORDER GRANTING 11 Motion to supplement Appellee's brief with recent case authority. Signed by Chief Judge Fred Biery. (tr1) (Entered: 10/31/2012)
03/22/13	14	MEMORANDUM OPINION AND ORDER AFFIRMING BANKRUPTCY COURT'S ORDER COMPELLING RETURN OF FUNDS. Signed by Judge David Ezra. The Court AFFIRMS the

		Bankruptcy Court's February 29, 2012 Order Compelling Return of Funds. (kh) (Entered: 03/22/2013)
04/19/13	15	Appeal of Order entered by District Judge 14 by Mary K. Viegelahn. (Filing fee $ 455 receipt number 0542-5449229) (Guerrero, Vanessa) (Entered: 04/19/2013)
04/19/13	—	NOTICE OF APPEAL on Bankruptcy Appeal Case following 15 Notice of Appeal (E-Filed) by Mary K. Viegelahn. Filing fee $ 455. (kh) (Entered: 04/19/2013)
05/14/13	16	Certified Record on Appeal. E-MAILED to US Court of Appeals on 5/14/2013, re 15 Notice of Appeal on Bankruptcy Appeal Case (to USCA) (E-Filed) by Mary K. Viegelahn, (APPEAL RECORD HELD FOR PICKUP PER 5TH CIRCUIT INSTRUCTIONS), (Attachments: # 1 Docket Sheets--Electronic Record on Appeal, # 2 Appellant's Designation of Items, # 3 Appellee's Designation of Items) (dtg) (Entered: 05/28/2013)
06/09/14	—	USCA Case Number 13-50374 for Notice of Appeal on Bankruptcy Appeal Case (to USCA) filed by Mary K. Viegelahn. (rf) (Entered: 06/09/2014)

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 13-50374

In re:

CHARLES E. HARRIS, III,
Debtor.

MARY K. VIEGELAHN,
Appellant,

v.

CHARLES E. HARRIS, III,
Appellee.

RELEVANT DOCKET ENTRIES

Date	Docket Text
04/22/13	BANKRUPTCY CASE docketed. NOA filed by Appellant Ms. Mary K. Viegelahn [13-50374] (RSM)
06/26/13	APPELLANT'S BRIEF FILED by Ms. Mary K. Viegelahn. Date of service: 06/26/2013 via email - Attorney for Appellant: DeLeon Guerrero; Attorney for Appellee: Cennamo [13-50374] REVIEWED AND/OR EDITED. . Brief NOT Sufficient: Caption Incorrect.

Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Sufficient Brief due on 07/01/2013 for Appellant Mary K. Viegelahn.. Record Excerpts due on 07/01/2013 for Appellant Mary K. Viegelahn. Appellee's Brief due on 07/29/2013 for Appellee Charles E. Harris III [13-50374] (Vanessa DeLeon Guerrero)

06/28/13 RECORD EXCERPTS FILED by Appellant Ms. Mary K. Viegelahn. Date of service: 06/28/2013 via email - Attorney for Appellant: DeLeon Guerrero; Attorney for Appellee: Cennamo [13-50374] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Record Excerpts deadline satisfied. Paper Copies of Record Excerpts due on 07/08/2013 for Appellant Mary K. Viegelahn. [13-50374] (Vanessa DeLeon Guerrero)

08/13/13 APPELLEE'S MEMORANDUM BRIEF FILED by Appellee Mr. Charles E. Harris, III. Date of service: 08/13/2013 via email - Attorney for Appellant: DeLeon Guerrero; Attorney for Appellee: Cennamo [13-50374] REVIEWED AND/OR EDITED.

APPELLEE'S BRIEF FILED . # of Copies Provided: 0 E/Res's Brief deadline

satisfied. Paper Copies of Brief due on 08/19/2013 for Appellee Charles E. Harris III.. Reply Brief due on 08/30/2013 for Appellant Mary K. Viegelahn [13-50374] (Steven Gerard Cennamo)

08/14/13 RECORD ON APPEAL REQUESTED. Miscellaneous due on 08/26/2013 for Attorneys Steven Gerard Cennamo and Vanessa DeLeon Guerrero, Attorney [13-50374] (NFD)

08/20/13 MOTION by National Association of Consumer Bankruptcy Attorneys to file amicus brief [7439567-2] Date of service: 08/20/2013 via email - Attorney for Appellant: DeLeon Guerrero; Attorney for Appellee: Cennamo [13-50374] REVIEWED AND/OR EDITED. MOTION by Amicus Curiae National Association of Consumer Bankruptcy Attorneys to file amicus brief [7439567-2] Date of Service: 08/20/2013 [13-50374] (Tara Ann Twomey)

08/23/13 COURT ORDER granting motion to file amicus brief [7439567-2] filed by National Association of Consumer Bankruptcy Attorneys in 13-50374 Judge(s): ECP. [13-50374] (CNF)

08/23/13 AMICUS CURIAE BRIEF FILED by National Association of Consumer Bankruptcy Attorneys. Consent is Not Necessary as a Motion has been Granted.
# of Copies Provided: 0

Paper Copies of Brief due on 09/03/2013 for Amicus Curiae National Association of Consumer Bankruptcy Attorneys. [13-50374] (CNF)

08/26/13 RECORD ON APPEAL FILED. Electronic Pleadings, 1; Paper Pleadings, 2, Bankruptcy for appellant and Bankruptcy for appellee; Paper Transcript, 1, bankruptcy for appellant; Exhibits, 1 env. (bankruptcy - appellee's exhibits from 2/14/2012 hearing); Exhibits, 1 env. (bankruptcy - appellant and appellee's designation of the record); Miscellaneous deadline satisfied [13-50374] (MVM)

08/27/13 APPELLANT'S REPLY BRIEF FILED by Ms. Mary K. Viegelahn Date of service: 08/27/2013 via email - Attorney for Amicus Curiae: Twomey; Attorney for Appellant: DeLeon Guerrero; Attorney for Appellee: Cennamo [13-50374] REVIEWED AND/OR EDITED.
# of Copies Provided: 0

Reply Brief deadline satisfied. Paper Copies of Brief due on 09/03/2013 for Appellant Mary K. Viegelahn. [13-50374] (Vanessa DeLeon Guerrero)

07/07/14	PUBLISHED OPINION FILED. [13-50374 Reversed and Remanded] Judge: FPB , Judge: EBC , Judge: JEG Mandate pull date is 07/28/2014 [13-50374] (JMA)
07/07/14	JUDGMENT ENTERED AND FILED. [13-50374] (JMA)
07/29/14	MANDATE ISSUED. Mandate pull date satisfied. [13-50374] (MVM)
10/09/14	SUPREME COURT NOTICE that petition for writ of certiorari [7749500-2] was filed by Appellee Mr. Charles E. Harris, III on 10/06/2014. Supreme Court Number: 14-400. [13-50374] (CAV)
12/16/14	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellee Mr. Charles E. Harris, III in 13-50374 on 12/12/2014. [7800291-1] [13-50374] (CAV)

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:	§	Case No.
Charles E. Harris, III	§	
	§	
Debtor(s)	§	**CHAPTER 13**
	§	**PLAN**

To the Honorable United States Bankruptcy Judge:

Comes now the Debtor(s) herein and, as required by 11 U.S.C. §1321, files this Debtor's Chapter 13 plan, and in support thereof would show the Court as follows:

Monthly Plan Payment

Debtor(s) shall each month submit such portion of Debtor's future earnings (or other future income) to the supervision and control of the Chapter 13 Trustee as is necessary for the execution of this plan. Payments by Debtor to the Trustee shall begin within thirty (30) days after the date the Order for relief is entered unless otherwise allowed by the Court. The Debtor's monthly plan payment shall be an amount equal to the Debtor's monthly disposable income or an amount sufficient to pay the claims of general unsecured creditors in full over the term of the plan, whichever first occurs.

Duration of Plan

The term of the plan shall not exceed sixty (60) months from the date the first monthly plan payment is due or until the claims of general unsecured creditors are paid in full, whichever first occurs, provided that the term may be extended by the granting of a moratorium by the Court after proper notice and opportunity for hearing, or other modification of the plan granted by the Court after proper notice and opportunity for hearing. Regardless of the total term, unless there has been a change in circumstances, the plan shall be deemed to have been completed when the Chapter 13 Trustee has received from or on behalf of the Debtor(s) an amount equal to the number of months specified in the Plan times the monthly plan payment or an amount necessary to pay the claims of general unsecured creditors in full, whichever first occurs, and as adjusted by any post-confirmation modifications of the amount of the monthly plan payment.

Payment of Claims

Allowed claims shall be paid to the holders thereof in accordance with the terms hereof. From the monthly payments described above, the Chapter 13 Trustee shall pay the following allowed claims in the manner and amounts specified. Claims filed by a creditor designated as secured or priority but which are found by the Court to be otherwise shall be treated as set forth in the Trustee's Recommendation Concerning Claims (TRCC).

Local Rule 3002 provides, in part, that EVERY creditor filing a proof of claim in all cases

SHALL transmit a copy with attachments, if any, to the Debtor's attorney (or the Debtor if the Debtor is pro se) and the Trustee appointed in the case.

A. Administrative Expenses: The Trustee shall pay the expenses, as prescribed by the Court, for administering the plan. The first monthly plan payment shall be paid to the Debtor's attorney as attorney's fees. The balance, if any, of Debtor's attorney's fees shall be paid concurrently with allowed secured claims in consecutive monthly installments. Such fees shall be paid in full prior to any payments being made to general unsecured creditors. Once Debtor's attorney fees are paid in full, those funds will be paid, pro rata, first to secured creditors, then to priority creditors and then to unsecured creditors.

B. Priority Claims: Other than Debtor's attorneys' fees, payment of which is provided for in the preceding paragraph, claims entitled to priority under 11 U.S.C. §507, except a claim entitled to priority under §507(a)(1)(B), shall be paid in full, pro rata, unless a specific payment amount is assigned to a particular priority claim, in deferred installments as funds become available upon completion of payment of attorneys' fees and allowed secured calims. The holder of any such claim may agree to a different treatment of such claim. Claims allowed under §507(a)(1)(B) are not dischargeable and may be paid less than the full amount only if the Debtor's disposable income is paid into the plan for 5 years.

C. Secured Claims: In the event a secured claim is treated pursuant to 11 U.S.C. §1325(a)(5)(B), secured creditors whose claims are allowed shall be

paid, in consecutive monthly installments, a principal amount equal to the value of their collateral or the amount of their net claim, whichever is less, plus interest thereon at the applicable rate. Unless objected to, the monthly installments proposed by the Debtor will be considered to provide adequate protection to such creditor during the term of the plan. The holders of such claims shall retain their liens on the collateral which is security for such claims (except for those liens which the Debtor(s) avoids by proper pleading and opportunity for hearing thereon) until the earlier of the payment of the underlying debt (determined under non-bankruptcy law) or discharge pursuant to §1328. If the case is dismissed or converted without completion of the plan, such lien is retained to the extent allowed by applicable non-bankruptcy law. The value of the collateral shall be deemed to be the value established by the Debtor, subject to objection, and, accordingly, the amount of the secured claim shall be established in the manner provided by the Local Rules and Standing Order of the United States Bankruptcy Court for the Western District of Texas, San Antonio Division, and the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines. In the event a creditor timely files a proof of claim which evidences a perfected security interest in collateral, which claim and collateral was not dealt with by the Debtor's plan, the collateral will be deemed valued by the Court at the amount set forth in the Trustee's Recommendation Concerning Claims (TRCC), unless a response and objection to the TRCC is timely filed.

D. Unsecured Claims: Unsecured claims may be separately classified provided, however, that all

claims within a particular class shall be treated the same. Any unsecured claim not over $50.00 may be paid pro rata, in equal installments or in full, at the election of the Trustee. The classes, generally, will be as follows:

1. **General unsecured:** The class of "general unsecured" claims shall comprise the claims of all creditors holding unsecured nonpriority claims, not otherwise designated as "special class" unsecured claims, including the unsecured portion of a secured creditor's bifurcated claim (i.e., the difference between the value of the collateral and the total amount of the claim) and secured claims the liens securing which have been avoided. Payments to general unsecured creditors shall be made on a pro rata basis as funds become available after secured and priority claims have been paid in full. The amount paid to general unsecured claimants shall depend on such factors as the total amount of claims actually filed and allowed, but the total amount paid to unsecured creditors shall be equal to or greater than the amount such creditors would receive, as of the effective date of the plan, if the Debtor's estate were liquidated under Chapter 7 of the United States Bankruptcy Code. In the event the Debtor owns non-exempt assets the liquidation of which would result in the immediate payment in full of all allowed general unsecured claims were the Debtor's estate liquidated under Chapter 7 of the United States Bankruptcy Code, then the Debtor shall pay the holders of such claim interest at the rate of five percent (5%) per annum on allowed claims over the term of the Chapter 13 plan. Interest that would otherwise accrue during the life of the plan is discharged upon completion of the plan, except for

any interest accruing on a debt to any general unsecured creditor whose debt (and/or interest) is nondischargeable under the law.

2. Special class: The class of "special class" claims shall comprise those claims that would otherwise be general unsecured claims but that the Debtor(s) has elected to pay in full despite the fact that general unsecured claims are not paid in full. Such claims include, but are not limited to, claims arising out of consumer debts for which any individual is liable with the Debtor by way of co-signature, guarantee, endorsement or otherwise ("co-signed debts"), claims based on NSF checks (or any other claims which might result in criminal prosecution), and student loans.

Vesting of Estate Property

Upon confirmation of the plan, all property of the estate shall not vest in the Debtor(s), but shall remain as property of the estate subject to the automatic stay of 11 U.S.C. §362.

Executory Contracts/Unexpired Leases:

Pursuant to 11 U.S.C. §1322(b)(7) of the Bankruptcy Code, the Debtor(s) hereby elects to assume or assign the following executory contracts, if any:

Creditor Name	Description of Contract	Election	In Default

(None)

Pursuant to 11 U.S.C. §1322(b)(7) of the Bankruptcy Code, the Debtor(s) hereby elects to reject the following executory contracts, if any:

Creditor Name	Description of Contract	Election	In Default

(None)

Direct Payments to Creditors

Certain claims may be paid directly to the holders thereof, not by the Chapter 13 Trustee, but rather by the Debtor(s) or some other party who shall be deemed acting as disbursing agent of the Trustee for payment of such claims. Creditors receiving such direct payments outside the plan may continue to issue payment books, coupons and any other method normally used to make and receive periodic payments and this shall not violate the provisions of 11 U.S.C. § 362.

Such payments shall be made in addition to the payments by Debtor to the Trustee as herein set forth.

If a creditor is allowed by Court Order to foreclose on, or otherwise take back his/her property, such creditor must notify the Chapter 13 Trustee immediately upon regaining the property. Upon entry of an Order Lifting Stay, the Trustee shall stop any further payment on that claim.

Any creditor who has obtained an order lifting the automatic stay, or an inferior lienholder in the case desiring to file a deficiency claim, must file such claim by amending or replacing their claim within 90 days of the property's reversion to the first lienholder.

Long Term Debts

Any amount not paid during the term of the plan on secured debts upon which the last payment is due

after the final payment under the plan is due ("long term debts") shall not be discharged. In the event the debt is secured by any real or personal property and either the holder of such secured claim obtains relief from the stay of 11 U.S.C. §362 for the purpose of foreclosing its lien on or security interest in such property or the Debtor elects to surrender the property to the creditor, then the entire debt shall be discharged pursuant to 11 U.S.C. §1328(a) or 11 U.S.C. §1328(b) and shall not be excepted from such discharge by 11 U.S.C. §1328(a)(1) or 11 U.S.C §1328(c)(1). A creditor may file an unsecured claim in the amount of any resulting deficiency after the collateral is liquidated and the proceeds thereof applied against the claim within ninety (90) days of such liquidation unless the Court orders otherwise.

Additional Provisions

Additional information, provisions and requirements are set forth in the Local Rules and Standing Orders of the United States Bankruptcy Court for the Western District of Texas, San Antonio Division, and in the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines which will be mailed to all parties affected hereby. These documents should be consulted in connection with any analysis of this plan and the effect thereof.

Proposed payments to individual creditors and the amount of payments to unsecured creditors may change as a result of the Meeting of Creditors or as Proofs of Claim are filed and allowed. Creditors may wish to attend the meeting of creditors and should be aware of any changes. All changes will be listed in the TRCC which will be served on all creditors after the deadline for filing proofs of claim has expired.

Specific Treatment for Payment of Allowed Claims

These are proposed treatments. Actual treatment may be different. When claims are finalized, you will be served with the "Trustee's Recommendation Concerning Claims" and the opportunity to object.

1. DIRECT PAYMENTS TO CREDITORS

Creditor Name	Remarks	Debt Amount	Monthly Payment
Chase Manhattan Mortgage	Direct pay beg March 2010.	$133,159.00	$960.00

2. SECURED CREDITORS: (Refer to paragraph C)

Creditor/ Collateral /Remarks	Estimated Amount	Estimated Value	Unsecured Portion	Mo. Pmt or Method of Dish.	Insured (Yes/ No) Name of Insurance	Indicated if to be Sold or Returned	Interest Rate
Chase Manhattan Mortgage 4807 Orchid Hair, San Antonio, Texas 78218 Pay clm + 7%@$352/ mo beg mo. 5	$3,700.00	$89,600.00	$0.000	$352.00	yes		7%
Comm TV Pay arr+ 7%@ $25/mo beg mo 5	$963.00	$900.00	$63.00	$75.34 Avg.	Yes		7%
Wfs Financial/ Wachovia Dealer Services 2008 Nissan Altima Surrender	$16,513.00	$8,400.00	$8,113.00	Surrender	Yes	Return	7%

3. PRIORITY CREDITORS: (Refer to paragraph B)

Creditor	Estimated Amount of Debt	Payment Method 1. Before 2. After 3. Along With Secured Creditors	Remarks
Malasise Law Firm	$3,000.00	Along With	See Supplemental Provisions

4. SPECIAL CLASS UNSECURED CREDITORS: (Refer to paragraph D-2)

Creditor / Remarks	Special Condition	Estimated Debt	Mo. Pmt or Method of Disb. on Est. Value

5. GENERAL UNSECURED CREDITORS: (Refer to paragraph D-1)

Creditor	Estimated Debt	Remarks
Capital 1 Bank	$2,082.00	
Ccs/first National Ban	$325.00	
Chase	$1,160.00	
Conns	$63.00	Unsecured portion of the secured debt (Bifurcated)
Credit Management	$410.00	

Credit One Bank	$352.00
Discover Fin Svcs Llc	$474.00
First Premier Bank	$282.00
First Premier Bank	$246.00
GC Services	$610.00
Hsbc Bank	$3,806.00
Mil Star	$7,177.00
N/A	
Nco Fin/09	$204.00
Us Dept Of Education	$2,006.00
Us Dept Of Education	$1,261.00

Totals

Priority **$3,000.00**, Secured **$4,600.00**, Special Class **$0.00**, Unsecured **$20,458.00**.

General Information

NOTICE: Local Rule 3002 provides, in part:

"Every creditor filing a Proof of Claim in all cases shall transmit a copy with attachments, if any to the Debtor's Attorney (or the Debtor if the Debtor is pro se) and the Trustee appointed in the case."

Creditors are hereby notified that WITHOUT FURTHER NOTICE the Plan may be amended at the Meeting of Creditors (341(a) meeting). Any amendment may affect your status as a creditor. The

Debtor's estimate of how much the Plan will pay, projected payments and estimates of the allowed claims may also change. The following information is an attempt to advise Creditors of the status of the case based on the information known at the time of its preparation. Any special concerns of a creditor may justify attendance at the First Meeting of Creditors and such other action as may be appropriate under the circumstances. More detailed information is on file at the office of the United States Bankruptcy Clerk in San Antonio, Texas.

1. The Debtor's Plan Payment is scheduled at **$530.00 Monthly**. ☑ Pay Order, ☐ Pay Order waived.

2. The plan proposes to pay in full all allowed priority, special class and secured claims to the extent of the value of the collateral and a total of no less than **$20,717.86** will be paid to nonpriority unsecured creditors with allowed claims during the Plan. Unsecured creditors will receive approximately **100%** of allowed claims. (See Note 1).

3. Value of non-exempt assets **$0.00**, ☑ Federal or ☐ State exemptions; ☑ Consumer Debtor or ☐ Business Debtor.

4. Current Monthly Income **$4,082.87**, - Amounts Reasonably Necessary to Be Expended **$3,312.17** = Monthly Disposable Income **$770.70**. (From Form B22C)

and/or

5. Monthly net income from Schedule I **$3,130.00**, - Expenses from Schedule J **$2,600.00** = Excess income **$530.00**

6. If the payment of any debt is proposed to be paid directly by the Debtor outside the Plan, it is so noted in the "Specific Treatment of Allowed Claims" set forth above.

Note 1: Creditors should note that the Debtor's projection of the percentage payment of allowed general unsecured claims is only an estimate. Such percentage is based upon the amount of debt of all classes listed by the Debtor(s) in the Debtor(s) schedules filed with the Court. If claims or amended claims are filed and allowed by the Court in an amount greater or lesser than that scheduled by the Debtor(s), the percentage paid to unsecured creditors may be different than is estimated here.

SUPPLEMENTAL PLAN PROVISIONS

The above plan is a uniform Chapter 13 plan adopted for use in the San Antonio Division of the Western District of Texas. None of its provisions can be altered except as hereinafter set forth in this Supplemental Plan Provision. To the extent any provision of the Supplemental Plan is in conflict with the provisions in the uniform plan, the Supplemental Plan shall prevail. Any provisions in the Supplemental Plan not provided for in the uniform plan shall become a part of the plan in addition to the provisions of the uniform plan.

The following are the Supplemental Plan Provisions:

Length of Plan

60 months

Malaise Law Firm

Pay first4mo's/then$100mo or more as funds become available.

Respectfully submitted this date: **02/24/2010**

/s/ Charles E. Harris, III
Charles E. Harris, III

APPENDIX E

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In Re: Case No. 10-50655 C

CHARLES E. HARRIS III

Debtor

SOCIAL SECURITY NO. Chapter 13

XXX-XX-164

ORDER TO EMPLOYER TO PAY THE TRUSTEE

UPON REPRESENTATIONS OF THE TRUSTEE, OR OTHER INTERESTED PARTIES, THE COURT FINDS THAT:

The above named debtor has pending in this Court a case for adjustment of debts by an individual with regular income under the provisions of Chapter 13 of Title 11 U.S.C. and pursuant to the provisions of said statute and of the debtor's plan, the debtor has submitted all of such portion of the debtor's future earnings or other future income to the supervision and control of the trustee of this Court as may be necessary for the execution of the debtor's plan; and

That under the provisions of Title 11 U.S.C., this Court has exclusive jurisdiction of all property including the earnings from such services performed by the debtor during the pendency of this case pursuant to 11 U.S.C. § 1325(b) any entity from whom the debtor receives income shall pay all or any part of such income to the trustee as may be ordered

by this Court. A portion of the debtor's earnings are necessary for the execution of the debtor's plan.

NOW, THEREFORE, IT IS ORDERED that until further order of this Court or until notice that this case has been dismissed or converted to Chapter 7 of the Bankruptcy Code is received, the employer of said debtor

DFAS - DE/DGC
6760 E. Irvington Place
Denver, CO 80279

shall deduct from the earnings of the debtor the sum of **$265.00 Semi-Monthly** beginning on the next payday following the receipt of this order and deduct a similar amount for each pay period thereafter, including any period for which the debtor receives periodic or lump sum payment for or on account of vacation, termination or other benefits arising out of present or past employment of the debtor. Employer shall remit forthwith the sums so deducted to the trustee appointed here or his/her successor in interest as follows:

J. Vincent Cameron, P.O. Box 1897,
San Antonio, TX 78297

IT IS FURTHER ORDERED, that said employer notify said trustee if the employment of said debtor is terminated and the reason for such termination.

IT IS FURTHER ORDERED, that all earnings and wages of the debtor, except the amounts required to be withheld by the provisions of any laws of the United States, the laws of any state or political subdivision, or by an insurance pension or union dues agreement between employer and the debtor, or by the order of this Court be paid to the aforesaid

debtor in accordance with employer's usual payroll procedure.

IT IS FURTHER ORDERED, that no deductions for account of any garnishment, wage assignment, credit union or other purpose not specifically authorized by this Court be made from the earnings of the debtor.

IT IS FURTHER ORDERED, that this order supersedes any and all previous orders, if any, made to the subject employer in this cause.

SO ORDERED.

SIGNED this 25th day of February, 2010.

George Prentice II

George D. Prentice II

Clerk, U.S. Bankruptcy Court
BY: Emilio Luna

APPENDIX F

SO ORDERED.

SIGNED this 15th day of April, 2010.

LEIF M. CLARK
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In Re: Chapter 13

CHARLES E. HARRIS III

Debtor(s) Case No. 10-50655 C

SSN XXX-XX-1640

ORDER CONFIRMING THE DEBTOR'S PLAN AWARDING A FEE TO THE DEBTOR'S ATTORNEY, AND RELATED ORDERS

Following the meeting of creditors held pursuant to 11 U.S.C. Section 341, at which the Debtor appeared in person to be examined by the creditors and other interested parties, a hearing was held pursuant to 11 U.S.C. Section 1324.

The Debtor is herein referred to in the masculine singular, even though this be a joint case or the Debtor be female. All references to "Rules" shall be

interpreted as referring to the Bankruptcy Rules, unless context indicates otherwise.

At such hearing, the following objections to confirmation of the Debtor's Plan were considered:

At the hearing, the Court considered the matters presented by the Trustee, the Debtor's attorney, and by other interested parties, if any, and upon the pleadings and statements of parties and of counsel, and on the evidence presented, the Court finds that:

A. Written notice of the meeting of creditors held pursuant to 11 U.S.C §341 and of this hearing on the confirmation of the Plan was given as required by rule 2002;

B. The Plan as presented for confirmation (hereinafter referred to as the "Plan") complies with the provisions of Chapter 13 of Title 11 of the United States Code and other applicable provisions of said Title;

C. Any fee, charge, or other amount required under Chapter 123 of Title 28 or required by the Plan to be paid before confirmation has been paid;

D. The Plan has been proposed in good faith and not by any means forbidden by law;

E. X As of the filing date of the Plan, the value of the property to be distributed to unsecured claims is not less than the amount they would receive if the estate of the Debtor was liquidated under Chapter 7 of Title 11 of the United States Code. The liquidation value, as of such date, of the Debtor's non-exempt property is $0.00.

OR

___ The Debtor will pay allowed unsecured claims the value of their claims plus interest at the rate of 5%. As of the filing date of the plan, the liquidation value of the Debtor's Non-exempt property is $0.00.

F. With respect to each allowed secured claim provided for by the Plan, the holder of such claim either accepted, or was deemed to have accepted, the Plan or, in the alternative,

(1).(a). The Plan provides that the holder of such claim retain the lien securing such claim, and

(b). The value, as of the effective date of the Plan, of property to be distributed under the Plan on account of such claim is not less than the allowed amount of such claim;

OR

(2). The Plan proposes to surrender the property securing such claim to the creditor.

G. The Plan provides for payment in full of all claims entitled to priority as defined in 11 U.S.C. section 507, the present value of all allowed secured claims, and (CHOOSE ONE)

(1). An amount no less than 100 percent of each allowed unsecured claim,

OR

(2). The Debtor's total payment to the Trustee under the Plan shall not be less than $0.00.

IT IS ORDERED THAT:

1. The Debtor's Plan is confirmed and (if appropriate) for cause shown, payments for a period not to exceed sixty (60) months are approved.

2. The Debtor or his employer shall make the payments to the Trustee required by the Plan. At any time during the pendency of the case, the Trustee may request the Court enter an order directing the Debtor's employer to make the appropriate payroll deductions and payments to the Trustee or to pay the Debtor's entire earnings and wages to the Trustee as prescribed by 11 U.S.C section 1325(b). Such an Order may be issued without further notice.

3. The Debtor shall, when applicable, obtain the approval of the Court prior to incurring additional consumer debt. Failure to obtain such approval, if applicable, may cause the claim for such debt to be unallowable to the creditor (11 U.S.C. section 1305(c)) and the debt to be nondischargeable for the Debtor (11 U.S.C. section 1328(d)).

4. The Trustee shall:

(a). Keep a detailed report of all receipts, including the source or other identification of each receipt, and of all distributions (Rule 2015); and

(b). Deposit all funds received by him under the Plan with an entity that provides insurance guaranties or deposits in the manner prescribed by 11 U.S.C. section 345, and make distribution thereof in the manner provided by Rule 3021.

5. Pursuant to 11 U.S.C. section 1326, the order of payment, unless otherwise directed, shall be:

(a). Any unpaid claim of the kind specified in section 507(a)(1) of Title 11 of the United States Code;

(b). The percentage fee fixed for the Trustee pursuant to section 586(e)(1)(B) of Title 28;

(c). Creditors whose claims are filed and allowed in such amounts and order of preference as may be provided by the Plan or as may be required to provide adequate protection of the interest of any entity with an interest in the property of the estate.

6. The Trustee, the Debtor, and the Debtor's attorney shall examine proofs of claim or summaries thereof and shall object to the allowance of improper claims as provided by Rule 3007.

(a). The Trustee shall file and serve all parties in interest with the Trustee's Recommendation Concerning Claims within ninety (90) days following the claim filing deadline. Such Trustee's Recommendation Concerning Claims shall include the Trustee's objections to claims, if any, recommendations as to the extent and validity of each creditor's security interest, if any, and recommendations as to the value of any collateral not previously valued by the Court. The Trustee's Recommendation Concerning Claims shall be deemed to be an objection to claims, a motion to value any such collateral, and an action to determine the validity of each creditor's security interest or an action to avoid any such security interest as set forth therein.

(b). Unless an objection or response is timely filed as to the treatment of any claim, the claim will be allowed only in the manner and amount listed in the Trustee's Recommendation Concerning Claims, and such treatment will be final and binding on all parties without further order of the Court.

(c). Responses or objections to the Trustee's Recommendation Concerning Claims, must be filed

within thirty (30) days from the date of service of the Trustee's Recommendation Concerning Claims.

(d). The Trustee's Recommendation Concerning Claims shall additionally contain notice of the bar date for any additional objections to claims, which date is fixed at thirty (30) days following the date of service of the Trustee's Recommendation Concerning Claims.

7. The Trustee shall maintain records (which may be in electronic form) reflecting funds received and disbursements made, and shall furnish such report to any interested party requesting copy of same, at no charge. Also, upon completion of the Plan, file with the Court a final report and account containing or incorporating by reference a detailed statement of receipts and disbursements (Rule 2015).

8. Ninety (90) days after the final distribution, the Trustee shall stop payment of all checks then unpaid and file with the Clerk of the Court a list of names and addresses, so far as known, of the persons entitled to such payments and the amounts thereof. The unclaimed funds shall thereupon be deposited in the registry of the United States Bankruptcy Court and may be withdrawn as provided in 28 U.S.C. section 2041.

9. All property of the estate, including any income, earnings, or other property which may become part of the estate during the administration of the case, shall not revest in the Debtor. Such property as may revest in the Debtor shall so revest only upon further Order of the Court or upon dismissal, conversion, or discharge. Debtor shall maintain adequate insurance coverage on all property for which any creditor holds

a lien unless such insurance coverage is specifically waived by such secured creditor. Further, the Trustee has no obligation or responsibility to obtain insurance for the Debtor or monitor the Debtor to insure that insurance has been obtained or maintained as required by this Order.

10. The Chapter 13 Trustee shall review all claims and the feasibility of the Plan prior to filing the Trustee's Recommendation Concerning Claims. If at that time the Plan is no longer feasible, the Trustee shall notify the Debtor and his attorney, in writing, of the infeasibility of the Plan. If forty-five (45) days after the service of the Trustee's Recommendation Concerning Claims the Plan remains infeasible, the Trustee shall file a Motion to Modify the Plan and/or a Motion to Dismiss the case.

Further, if at any time during the term of the Chapter 13 case, a claim is allowed which makes the Plan infeasible, the Chapter 13 Trustee shall notify the Debtor and his attorney, in writing, of the infeasibility of the Plan. If the Plan remains infeasible for thirty (30) days after such notice, the Trustee shall file a Motion to Modify the Plan and/or an alternative Motion to Dismiss the case.

11. At the time of the issuance of this Order Confirming the Plan, the the time for filing claims in this case may not have expired. Consequently, the Court specifically reserves the right in the future to:

(a). Alter or sustain an objection to the secured status of a claim filed as secured either before or after the entry of this Order Confirming Plan, and value the collateral securing any such claim to the

extent not previously valued herein or otherwise by the Court;

(b). Enter a Final Order after notice and hearing on any responses or objections to the Trustee's Recommendation Concerning Claims, and on any additional objection(s) to claims timely filed by a party in interest;

(c). At any time during the pendency of this case, entertain a motion to alter or sustain an objection to the secured status of a claim filed as secured after the bar date for filing claims has expired, or to value the collateral securing any such claim to the extent not previously valued by the Court.

12. All creditors having allowed secured claims (whether filed before or after this Order Confirming Plan) shall be treated in accordance with section 1325(a)(5), except as otherwise specifically set forth herein. The collateral securing creditor's claims provided for under the Debtor's Plan is hereby valued by the Court at the values set forth below.

(a). When the value of the collateral securing a timely filed proof of claim of any taxing authority differs from the value shown on the Debtor's Plan, the Trustee will use the value shown on the creditor's proof of claim. All parties will be noticed of this valuation through the Trustee's Recommendation Concerning Claims and disputed valuations may be resolved by the Court, by agreement or objection.

(b). In those instances where no objection was filed to Confirmation of the Debtor's Plan contesting the Debtor's valuation of collateral securing a creditor's claim, the value of such collateral is fixed at the

values provided in the Debtor's Plan (which values include any valuation of collateral agreed to by the Debtor at the meeting of creditors held pursuant to 11 U.S.C. section 341, such agreed values being hereby deemed a modification and/or supplementation to the Debtor's Plan), as follows:

CREDITORS	COLLATERAL	VALUE
SEE ATTACHMENT A-1		

(c). In those instances, if any, where an objection was filed to the valuation of collateral as provided in the Debtor's Plan, the Court determines and fixes the value of such collateral as follows:

CREDITORS	COLLATERAL	VALUE

(d). In the event a creditor timely files a proof of claim which evidences a perfected security interest in collateral which was not specified by the Plan and not previously valued by the Court, such collateral will be valued by the Court at the value set forth in the Trustee's Recommendation Concerning Claims to be filed herein, unless a response to such Trustee's Recommendation Concerning Claims is timely filed. Such Trustee's Recommendation Concerning Claims is to be filed and served within ninety (90) days following the deadline for filing proofs of claims. Responses to such Trustee's Recommendation Concerning Claims must be filed within the time and in the manner provided in such Trustee's Recommendation Concerning Claims.

(e). The valuation of collateral by the Court as set forth above shall not relieve a secured creditor from the duty to file a proof of claim in order to from objecting to the amount claimed by any such creditor, or from bringing an action to determine the

extent or validity of such creditor's security interest or to avoid any such security interest.

ALLOWANCE OF ATTORNEY'S FEES:

Debtor's Attorney: MALAISE LAW FIRM P C

Business Case: Yes ___ No _X_

The application by the attorney for the Debtor for the allowance of reasonable compensation as authorized by 11 U.S.C section 330, having been considered, the Court finds that a reasonable fee for the services performed and undertaken by such attorney is **$3,200.00** of which **$200.00** was paid to such attorney prior to filing of the petition initiating this proceeding.

The balance of such fee **$3,000.00** shall be paid by the Trustee from monies received under the Debtor's Plan; provided, however, that such payments shall be deferred in time to payments, if any, which may be required to provide adequate protection of the interest of the holders of any secured claims.

OR

The attorney for the Debtor shall file an application for the allowance of compensation as authorized by 11 U.S.C. section 330.

OR

The attorney for the Debtor has requested that he be paid no fee in this case and has not filed an application for the allowance of reasonable compensation as authorized by 11 U.S.C. section 330. Accordingly, no attorney's fee will be paid by the Trustee from the monies received under the Debtor's Plan.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:

CHAPTER 13
10-50655 C

CHARLES E. HARRIS III
DEBTOR(S)

SCHEDULE A – 1

CREDITOR	COLLATERAL	VALUE
CHASE HOME FINANCE	HM ARRS	7.00% ARREARS
CHASE HOME FINANCE	HM/OUTSIDE	OUTSIDE PLAN
CONNS CREDIT CORPORATION	TV	$900.00 7.00% SECURED
SYLVIA ROMO	10 TAXES/OUT BY MTG	OUTSIDE PLAN
WELLS FARGO DEALER SERVI	05 NISSAN ALTIMA/SURR-$16,439	SURRENDERED

THE PLAN PAYMENT IS:
$530 MO 1
$536 MOS 2-60

###

No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR THE PETITIONER

J. TODD MALAISE
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QUESTION PRESENTED

Chapter 13 of the Bankruptcy Code allows debtors to turn a portion of their monthly income over to a Chapter 13 trustee for distribution to creditors. At any time, however, a debtor may convert a Chapter 13 bankruptcy case to a Chapter 7 case. So long as that conversion is made in good faith, the resulting Chapter 7 estate comprises the debtor's property as of the date the original Chapter 13 petition was filed; it does not include wages or property that the debtor acquired *after* the petition date. See 11 U.S.C. § 348(f).

The question presented is:

Whether, when a debtor converts a bankruptcy case to Chapter 7 after confirmation of a Chapter 13 plan, undistributed funds held by the Chapter 13 trustee are refunded to the debtor (as the Third Circuit held in *In re Michael*, 699 F.3d 305 (2012)) or distributed to creditors (as the Fifth Circuit held below).

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5 *Collier on Bankruptcy* (15th ed., Lawrence P. King ed., 1985).....34

3 *Collier on Bankruptcy* (16th ed., Alan N. Resnick & Henry J. Sommer eds, 2012).....21, 27

8 *Collier on Bankruptcy* (16th ed., Alan N. Resnick & Henry J. Sommer eds., 2012)). 6, 21

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a–28a) is reported at 757 F.3d 468. The district court's decision (Pet. App. 29a–49a) is reported at 491 B.R. 866. The bankruptcy court's opinion (Pet. App. 50a–51a) is unreported.

JURISDICTION

The Fifth Circuit issued its decision on July 7, 2014. The petition for a writ of certiorari was granted on December 12, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In pertinent part, 11 U.S.C. § 348 provides:

(e) Conversion of a case under section 706, 1112, 1208, or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion.

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession or is under the control of the debtor on the date of conversion;

* * * * *

(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.

11 U.S.C. § 1327 provides:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

STATEMENT

This case is about wages earned by a debtor *after* he files for bankruptcy. As a general matter, how post-petition wages are treated depends on whether the debtor is proceeding under Chapter 13 of the Bankruptcy Code (in which a debtor retains his assets during bankruptcy subject to a court-approved payment plan) or Chapter 7 (in which the debtor's assets are liquidated and the proceeds distributed to creditors). In a Chapter 13 case, post-petition wages are "property of the estate"; in a

Chapter 7 case, they are not. See 11 U.S.C. §§ 541, 1306.

But what happens when a debtor converts a Chapter 13 case to Chapter 7, which he is statutorily authorized to do "at any time"? 11 U.S.C. § 1307(a). More particularly, if the Chapter 13 trustee already holds some of the debtor's post-petition wages when the case is converted, may she distribute those to creditors even though it is now a Chapter 7 case?

The answer is no. Congress has provided that, "[e]xcept" when a debtor makes the conversion "in bad faith," those wages do not remain "property of the estate" in the converted case. 11 U.S.C. § 348(f). Moreover, conversion "terminates the service" of the Chapter 13 trustee, 11 U.S.C. § 348(e), who had been acting as "the representative of the estate," 11 U.S.C. § 323(a). That is, the act of conversion immediately removes the case from Chapter 13 and puts it into Chapter 7; only when a conversion is made "in bad faith" does the debtor's post-petition property follow the estate into the Chapter 7 case and remain available to creditors. That result is dictated by the statutory text, and it fully squares with the Bankruptcy Code's purpose to encourage debtors to attempt to repay their debts in Chapter 13 rather than immediately resort to liquidation under Chapter 7. The court of appeals reached the opposite result, but only by criticizing petitioner for reading the statute "too literally." Pet. App. 10a (quoting *In re Parrish*, 275 B.R. 424, 430 (Bankr. D.D.C. 2002)).

1. The commencement of a bankruptcy case under any chapter of the Bankruptcy Code creates an estate. 11 U.S.C. § 541(a). In a Chapter 7 case, the debtor's assets are sold and the proceeds

distributed to creditors. The "property of the estate" comprises the debtor's property "as of the commencement of the case." 11 U.S.C. § 541(a)(1). That "estate is placed under the control of a trustee, who is responsible for managing liquidation of the estate's assets and distribution of the proceeds." *Law* v. *Siegel*, 134 S. Ct. 1188, 1192 (2014) (citing 11 U.S.C. § 704(a)(1)). Liquidation is commenced, debts are discharged, and the debtor keeps whatever property he acquired after the commencement of the case. 11 U.S.C. § 727(b). It is a salient feature of Chapter 7 bankruptcies that creditors recover very little on their claims, and often nothing at all. See, *e.g.*, *Wachovia Mortgage* v. *Smoot*, 478 B.R. 555, 560 (E.D.N.Y. 2012).

By contrast, an "individual with regular income," and with debts under certain limits, may commence a case under Chapter 13. 11 U.S.C. § 109(e); see also 11 U.S.C. § 101(30). Debtors proceeding under that chapter "must agree to a court-approved plan under which they pay creditors out of their future income." *Hamilton* v. *Lanning*, 130 S. Ct. 2464, 2469 (2010). In return, "[u]nlike debtors who file under Chapter 7 and must liquidate their nonexempt assets in order to pay creditors, Chapter 13 debtors are permitted to keep their property." *Id.* at 2468–2469 (internal citations omitted); see also 11 U.S.C. § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."). Under Chapter 13, the "property of the estate" expands to include most property "that the debtor acquires *after* the commencement of the case," including any "earnings from services performed by the debtor *after*

commencement of the case"—*i.e.*, his post-petition wages. 11 U.S.C. § 1306(a)(1), (2) (emphasis added).

A Chapter 13 debtor must propose a plan that will repay his creditors within three to five years. 11 U.S.C. §§ 1321, 1325(b)(4). The debtor must agree to repay secured creditors in full (or else to surrender the collateral), and to pay unsecured creditors at least as much as they would have received in a Chapter 7 liquidation of petitioner's assets. 11 U.S.C. § 1325(a)(4), (5). Moreover, the debtor must commit his post-petition "disposable income" to the plan. 11 U.S.C. § 1325(b); see also *Ransom* v. *FIA Card Servs., N.A.*, 131 S. Ct. 716, 721–722 (2011). To that end, a Chapter 13 plan must "provide for the submission * * * to the supervision and control of the trustee" of either "all" the "future earnings or other future income of the debtor" or "such portion of" the debtor's future earnings and income "as is necessary for the execution of the plan." 11 U.S.C. § 1322(a)(1). The court can order the debtor's employer "to pay all or any part of such income to the trustee." 11 U.S.C. § 1325(c).

In sum, under Chapter 13—but not under Chapter 7—a debtor devotes a substantial part of his post-petition income to repaying his creditors over time. A debtor must elect to adjust and repay his debts under Chapter 13, and only the debtor may commence such a proceeding—there is no such thing as an involuntary Chapter 13 proceeding. See 11 U.S.C. § 303(a). Likewise, "[t]he debtor may convert a case under [Chapter 13] to a case under chapter 7 * * * at any time." 11 U.S.C. § 1307(a). "Any waiver of the right to convert * * * is unenforceable." *Ibid.* The debtor converts his own case immediately upon

filing a notice of conversion. 11 U.S.C. § 1307(a); Fed. R. Bankr. P. 1017(f)(3); see also 8 *Collier on Bankruptcy* ¶ 1307.02, at 1307-6 (16th ed., Alan N. Resnick & Henry J. Sommer eds., 2012) ("Once the debtor files a notice of conversion, the conversion is automatic and immediate.").

Section 348 of the Bankruptcy Code specifies the "effect" of a conversion from Chapter 13 to Chapter 7: "[W]hen a case under chapter 13 * * * is converted to a case under another chapter * * * property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition*, that remains in the possession of or is under the control of the debtor on the date of conversion." 11 U.S.C. § 348(f)(1) (emphasis added). There is only one "[e]xcept[ion]": When a debtor converts in bad faith, "the property of the estate in the converted case shall consist of the property of the estate *as of the date of conversion*." 11 U.S.C. § 348(f)(2) (emphasis added).

The conversion also immediately "terminates the service of any trustee * * * that is serving in the case before such conversion." 11 U.S.C. § 348(e). An interim trustee under Chapter 7 is then appointed "[p]romptly" (11 U.S.C. § 701) to be the new "representative of the estate" (11 U.S.C. § 323(a)). The Chapter 13 trustee's remaining duties, which are specifically enumerated by statute and rule, are limited to certain administrative tasks designed to wrap up the now-converted Chapter 13 case. These duties are to turn over records and property of the estate in the trustee's possession to the new Chapter 7 trustee, see Fed. R. Bankr. P. 1019(4), and to file a final report and account of the trustee's

administration of the estate under Chapter 13, 11 U.S.C. §§ 704(a)(9), 1302(b)(1); Fed. R. Bankr. P. 1019(5)(B)(ii).

2. In early 2010, petitioner Charles E. Harris, III, fell $3,700 behind on the (then-underwater) mortgage he had taken out on his home in the outskirts of San Antonio. Pet. App. 3a; Bankr. Pet. Schedule A, *In re Harris*, No. 10-50655, Doc. 1 (Bankr. W.D. Tex. Feb. 24, 2010) ("Bankr. Pet.").

a. After accounting for his basic living expenses, petitioner had just $530 a month left over from his paychecks. Bankr. Pet. Schedules I & J. Accordingly, he proposed a payment plan under which he would pay his mortgage arrears and other debts over 60 months out of $530 his employer would deduct from his wages each month and remit to the respondent, Mary K. Viegelahn, the Chapter 13 Standing Trustee for the San Antonio Division of the Western District of Texas. Pet App. 3a–4a; J.A. 34, 37. The plan specified that Harris's mortgage lender, Chase, would receive $352 per month on its secured claim for the mortgage arrears, and the only other secured creditor provided for in the plan, a consumer-electronics store, would receive an average distribution of $75.34 per month. J.A. 34.[1] Once those secured lenders were paid in full, the trustee would begin distributions to petitioner's unsecured

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[1] Additional funds would be disbursed to respondent as her percentage fee (see 28 U.S.C. § 586(e)(1)) and to petitioner's attorney (J.A. 35). The plan also provided for petitioner to give up his five-year-old car to his secured automobile lender. See J.A. 34; see also Pet. App. 27a n.12.

creditors. The bankruptcy court confirmed the plan in April 2010. Pet. App. 30a; J.A. 43–53.

Petitioner's plan also required him to continue making monthly mortgage payments directly to Chase as they came due. J.A. 34. Ultimately, however, petitioner fell behind on his mortgage payments again. Pet. App. 4a; Mot. for Relief from Stay, *In re Harris*, No. 10-50655, Doc. 22, at 3 (Bankr. W.D. Tex. Oct. 13, 2010) ("Mot. for Relief"). In October 2010, Chase moved to lift the automatic bankruptcy stay to begin foreclosure proceedings. *Ibid.* Petitioner did not oppose that relief, Pet. App. 4a, and the court granted the motion in November 2010, J.A. 6. At that point, as required by petitioner's confirmed Chapter 13 plan,[2] respondent stopped distributing $352 of petitioner's monthly wages to Chase because it had been granted leave to seek repayment of petitioner's mortgage arrears through foreclosure. Pet. App. 17a.

b. Having failed to save his home, petitioner filed a notice converting his case to Chapter 7 on November 21, 2011. Pet. App. 31a. It is undisputed that petitioner converted the case in good faith. He had tried to pay off all his debts over time, but could not keep up with payments on his $89,600 home, Bankr. Pet. Schedule C-1, for which he still owed Chase $133,159.40 in principal "plus accrued

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[2] The plan specified that "[i]f a creditor is allowed by Court Order to foreclose on, or otherwise take back his/her property, such creditor must notify the Chapter 13 Trustee immediately upon regaining the property. Upon entry of an Order Lifting Stay, the Trustee shall stop any further payment on that claim." J.A. 32.

interest, late charges, attorneys fees and costs," Mot. for Relief 3.

That conversion took effect immediately, see 11 U.S.C. § 1307(a); Fed. R. Bankr. P. 1017(f)(3), and automatically "terminate[d] the service" of respondent, 11 U.S.C. § 348(e). Indeed, the very next day, the bankruptcy court clerk updated the docket sheet to reflect that respondent had been "removed from the case" and an interim Chapter 7 trustee had been appointed. J.A. 7; see also Order Combined with Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines, *In re Harris*, No. 10-50655, Doc. 32, at 1 (Bankr. W.D. Tex. Nov. 22, 2011).

At the time of petitioner's conversion, and after he had assigned $1,200 to pay his attorneys' fees, respondent held $4,319.22 of petitioner's post-petition wages. Pet. App. 4a. On December 1, 2011—ten days *after* the conversion—respondent distributed those post-petition wages to Chapter 13 creditors instead of returning them to petitioner. *Ibid.* In the end, respondent handed out an additional $397.68 to the secured-creditor consumer-electronics store, $3,573.78 to six unsecured creditors, and $267.79 to herself as a percentage fee pursuant to 28 U.S.C. § 586(e)(1). Pet. App. 4a.

c. Petitioner moved to compel the refund of that money, arguing that respondent had distributed it without authority. Pet. App. 5a. Following a hearing, the bankruptcy court granted petitioner's motion and ordered respondent to refund to petitioner the money she had distributed to creditors (and herself) after petitioner converted to Chapter 7. *Id.* at 50a. At the hearing, the court held that "the language of the

statute is straightforward": "[Section] 348 says that conversion of the case under * * * [Section] 1307 * * * terminates the service of any trustee that is serving in the case before the conversion. So, the trustee can no longer be functioning as the trustee, and, therefore, can no longer be functioning as the disbursing agent." Tr. of Feb. 14, 2014 Hearing, *In re Harris*, No. 10-50655, Doc. 52, at 21 (Bankr. W.D. Tex. Mar. 13, 2012); accord *id.* at 22 ("[I]t looks to me like the statutory language is pretty clear."). The trustee's argument in support of her post-conversion distribution "presumes," incorrectly, the court held, "that the trustee is still the trustee." *Id.* at 21.

d. In the meantime, petitioner's case proceeded under Chapter 7. With his home and mortgage out of the case, petitioner's only remaining assets—household goods and personal effects, a small amount of cash, a $5,500 retirement account, and a modest future tax refund, see Bankr. Pet. Schedules C & C-1—were all exempt from his estate under 11 U.S.C. § 522(b)(2). Accordingly, petitioner's newly appointed Chapter 7 trustee reported to the court in December 2011 what had already been true for months: Petitioner had "no property available for distribution from the estate over and above that exempted by law." J.A. 8. On February 23, 2012, the bankruptcy court granted petitioner a discharge pursuant to Section 727 of the Bankruptcy Code. See Order Discharging Debtor, *In re Harris*, No. 10-50655C, Doc. 43, at 1 (Bankr. W.D. Tex. Feb. 23, 2012).

3. Respondent appealed the refund order, and the district court affirmed. Pet. App. 29a–49a.

The court "agree[d] with the Third Circuit's reasoning" in *In re Michael* that "the funds in question must be returned to the debtor." Pet. App. 34a. It held "that 11 U.S.C. § 348(e) prohibits a Chapter 13 trustee from disbursing, after conversion to Chapter 7, plan payments made by the debtor prior to conversion." *Id.* at 48a. Upon conversion from Chapter 13 to Chapter 7, the district court explained, "[a] plain reading of § 348(f)(1)(A) would seem to establish * * * that the funds should not be considered part of the Chapter 7 estate in the absence of a bad-faith conversion." *Id.* at 38a. The court reasoned that Congress's answer to bad-faith conversions in Section 348(f)(2) "support[s]" "the idea that Congress would want the disputed funds to be returned to [the] [d]ebtor" upon his good-faith conversion. *Id.* at 47a.

The district court further concluded that, "when a case is converted from Chapter 13 to Chapter 7, the order converting the case is effectively backdated to the date on which the Chapter 13 petition was filed." Pet. App. 37a. "Accordingly, the Code provides that 'property of the estate in the converted [Chapter 7] case shall consist of property of the estate, *as of the date of filing of the [Chapter 13] petition*, that remains in the possession of or is under the control of the debtor on the date of conversion.'" *Ibid.* (quoting 11 U.S.C. § 348(f)(1)(A)). And the court rejected respondent's arguments that creditors were entitled to the funds: The Code, it held, neither vests creditors with a right to undistributed post-petition wages, nor permits the distribution of those funds to creditors upon conversion from Chapter 13. See *id.* at 48a–49a (discussing 11 U.S.C. §§ 1326(a)(2), 1327).

The district court's interpretation of the statutory text accorded with Congress's intent. The Bankruptcy Code, the court explained, implements a "Congressional policy of encouraging debtors to attempt a Chapter 13 bankruptcy—through which a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7." *Ibid.* Such a policy of encouraging resort to Chapter 13 can be achieved, the court concluded, only if the debtor can convert to Chapter 7 "without penalty if that attempt fails." *Ibid.* And to whatever extent its holding might "incentivize bad-faith conversions" to "game the system," the district court stated that Section 348(f)(2) of the Bankruptcy Code provided Congress's response. Pet. App. 47a.

The approach urged by respondent, in contrast, "would create" a powerful reason for debtors to avoid Chapter 13 altogether—"precisely the kind of disincentive to file a Chapter 13 bankruptcy that Congress was trying to avoid." Pet. App. 48a. A debtor's post-petition wages, the court noted, are not included in a Chapter 7 estate, and a debtor who elects to proceed under Chapter 7 from the start puts those funds beyond the reach of his creditors. See *id.* at 47a–48a. But a debtor who chooses to put those funds *within reach* of his creditors in order to attempt to make a Chapter 13 plan work should not be penalized by the loss of *more of* those funds to his creditors if such a plan later proves unworkable. See *ibid.* A Chapter 13 trustee's post-conversion disbursement to creditors of a debtor's post-petition wages, the court held, is antithetical to that policy. *Id.* at 43a–45a.

Finally, the district court observed that there is "nothing unfair about returning [undistributed, post-petition wages] to a debtor rather than to his creditors." Pet. App. 46a. During the pendency of the Chapter 13 case, creditors would already "have had the benefit of distribution from debtors' wage contributions, which would not have been available to them under Chapter 7." *Ibid.* (quoting *In re Boggs*, 137 B.R. 408, 410 (Bankr. W.D. Wash. 1992)).

4. Respondent appealed again, and a panel of the Fifth Circuit reversed. The court of appeals held that, notwithstanding petitioner's good-faith conversion to Chapter 7, his post-petition wages were appropriately distributed to his creditors under his Chapter 13 plan. Pet. App. 5a–28a.

The Fifth Circuit found "little guidance in the Bankruptcy Code." Pet. App. 22a. Section 348(e)'s termination of the Chapter 13 trustee's "service" upon conversion, it said, should not be taken "too literally." *Id.* at 10a (quoting *In re Parrish*, 275 B.R. at 430); see also Br. in Opp. 15 ("Respondent posits that 11 U.S.C. § 348(e), which terminates a trustee's services upon conversion, cannot be taken too literally."). Although the panel found it "clear" that "after conversion, the debtor's continuing obligations under the [Chapter 13] plan * * * cease," and the plan no longer binds creditors, *id.* at 13a, it saw "no reason why" the Chapter 13 trustee's "power and duty to wrap up certain affairs of the estate" could not include "distributing the funds remaining in her possession" after conversion, *id.* at 14a. That is, the court viewed disbursing the post-petition funds as arguably akin to the outgoing trustee's other "ancillary[,] * * * administrative duties." *Id.* at 11a

(quoting *In re Michael*, 699 F.3d at 320 n.8 (Roth, J., dissenting)). Likewise, the panel did "not read * * * much into the fact that upon conversion, a Chapter 13 plan is 'no longer in force.'" *Id.* at 13a (discussing 11 U.S.C. § 348(e)). The panel disregarded Section 348(f) as not "explicitly stat[ing] what should happen to these funds." *Id.* at 9a.

The Fifth Circuit turned instead "to considerations of equity and policy," relying heavily on Judge Roth's dissent in *In re Michael*. See Pet. App. 22a–28a. It rejected respondent's argument that the Bankruptcy Code provides Chapter 13 creditors a "vested right to receive payments pursuant to a confirmed Chapter 13 plan once the debtor transfers the payments to the trustee." *Id.* at 14a (discussing 11 U.S.C. § 1326(a)); see also *id.* at 15a–22a (rejecting, for similar reasons, creditor-vesting arguments under 11 U.S.C. §§ 1326(c) and 1327)). Although it acknowledged that "payments made under the plan do not give creditors any vested rights to payment," the panel concluded that "the creditors' claim to the undistributed funds is superior to that of the debtor." *Id.* at 28a. Finally, the court asserted that the result would not render the Section 348(f)(2) bad-faith provision "superfluous," *id.* at 22a, because—at least in some cases—"undistributed post-petition wages paid to the trustee under the Chapter 13 plan constitute only a subset of the debtor's post-petition property," *id.* at 21a.

SUMMARY OF ARGUMENT

I. The plain language of the Bankruptcy Code answers the question presented. The court of appeals' refusal to read the statute "too literally,"

Pet. App. 10a (quoting *In re Parrish*, 275 B.R. 424, 430 (Bankr. D.D.C. 2002)), was error.

A. Petitioner's good-faith conversion of his case from Chapter 13 to Chapter 7 excluded his post-petition wages from the "property of the estate" available to his creditors. 11 U.S.C. § 348(f)(1)(A). Congress has stated that "[e]xcept" when a debtor makes such a conversion in bad faith, the post-conversion estate under Chapter 7 comprises *only* the property the debtor had at the time he filed his Chapter 13 petition, and *not* any property (including wages) he acquired afterward. 11 U.S.C. § 348(f). The Fifth Circuit's recognition of another, unstated exception, under which a debtor's post-petition wages may be distributed to creditors by a Chapter 13 trustee notwithstanding a good-faith conversion, contradicts the intended effect of Section 348(f)(1) and nullifies for such wages the effect of Section 348(f)(2)'s bad-faith exception.

B. Petitioner's conversion of his case from Chapter 13 to Chapter 7 immediately "terminate[d]" respondent's "service" as trustee of the estate. 11 U.S.C. § 348(e). Accordingly, respondent lost her statutory authority to disburse funds to creditors upon conversion. Respondent's remaining duties were specifically limited, by statute and rule, to "turn[ing] over to the Chapter 7 trustee any records and property of the estate in her possession or control, and * * * fil[ing] a final report and account." Pet. App. 10a (citing Fed. R. Bankr. P. 1019(4), (5)(B)(ii)). Those limited obligations on respondent to account for her previous administration of the estate are not a license to continue administering it.

C. Section 1327 provides that, "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1327(b). The confirmation order in this case "otherwise provided" (*ibid.*) that property of the estate would "revest" in the debtor "upon * * * conversion." J.A. 48. Such vesting of the estate's property in the debtor—whether it happened at confirmation (under the default rule) or upon conversion (as specified here)—directs the return of undistributed post-petition wages to a debtor who converts his case out of Chapter 13.

II. Returning post-petition wages to a debtor who converts to Chapter 7 in good faith removes an otherwise serious disincentive for debtors to attempt debt repayment under Chapter 13. That rule also avoids needless and illogical inconsistency between the effect of conversions and dismissals, and recognizes the debtor's superior interest in funds he voluntarily made available to his creditors in the first place.

A. Returning post-petition wages to a debtor who converts his case from Chapter 13 to Chapter 7 furthers Congress's goal of encouraging debtors to choose a Chapter 13 proceeding, and to stick with it as long as it is feasible. Once a debtor converts an unsuccessful Chapter 13 case to a Chapter 7 case, in which post-petition wages *never* would have been property of the estate, the post-conversion distribution of those wages to creditors penalizes the failed attempt. Because a debtor must elect to proceed under Chapter 13, 11 U.S.C. §§ 301–303, and can convert or dismiss a Chapter 13 case at any time,

11 U.S.C. § 1307(a), (b), such a penalty is contrary to Congress's intent.

B. The rule adopted below, by contrast, establishes an illogical inconsistency with the refund of a Chapter 13 debtor's post-petition wages *upon dismissal*. See 11 U.S.C. § 349(b)(3). That nonsensical result "would merely elevate form over substance," "inject a needless degree of extra work on the part of all concerned," and "creat[e] a trap for the unwary." *In re Michael*, 699 F.3d 305, 314 (3d Cir. 2012) (quoting *Arkison* v. *Plata (In re Plata)*, 958 F.2d 918, 922 (9th Cir. 1992)).

C. The Fifth Circuit's reliance on purported "considerations of equity and policy" (Pet. App. 22a) was misplaced. Returning post-petition wages to debtors at conversion would neither give debtors a "windfall" (*id.* at 25a (quoting *In re Michael*, 699 F.3d at 319 (Roth, J., dissenting)), nor deprive creditors of any "*quid pro quo*" (*id.* at 26a (quoting *In re Michael*, 699 F.3d at 320 (Roth, J., dissenting)). If anyone received a windfall here, it was petitioner's unsecured creditors. When petitioner converted, they received payments that they had not yet expected, and would not have been entitled to had petitioner originally filed under Chapter 7 or converted his case earlier. There is nothing untoward about returning a debtor's post-petition wages to him once his voluntary attempt to repay creditors out of those wages proves unsuccessful.

ARGUMENT

I. The Statutory Text Excludes Post-Petition Wages From The Post-Conversion Property Of The Estate And Terminates The Chapter 13 Trustee's Authority To Disburse Such Wages

Statutory interpretation, of course, must "start * * * with the language of the statute," giving words their "'ordinary or natural' meaning." *Bailey* v. *United States*, 516 U.S. 137, 144-145 (1995). When the text of the statute is clear, that is the "end of the matter." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). The statutory text here is pellucid: Congress directly addressed the "effect of conversion" from Chapter 13 to Chapter 7, declaring that a debtor's post-petition income is not included as property of the Chapter 7 estate and that the Chapter 13 trustee's service "terminates."

The court of appeals, however, said that the statute should not be read "too literally." Pet. App. 10a (quoting *In re Parrish*, 275 B.R. 424, 430 (Bankr. D.D.C. 2002)). The Fifth Circuit instead relied on its own "considerations of equity and policy." *Id.* at 22a. That was wrong. The Bankruptcy Code unambiguously provides that conversion both removes post-petition wages from the property of the estate—"[e]xcept" when the conversion is made in bad faith, 11 U.S.C. § 348(f)—and "terminates" the trustee's authority to disburse those wages to creditors, 11 U.S.C. § 348(e). Moreover, the Code requires that

those wages be returned to the debtor in whom ownership has revested. 11 U.S.C. § 1327(b).

A. Section 348(f) Excludes Post-Petition Wages From The Property Of The Estate Upon A Good-Faith Conversion

1. In a Chapter 13 case, the property of the estate includes property acquired, and wages earned, by the debtor "after the commencement of the case." 11 U.S.C. § 1306(a), (b). In a Chapter 7 case, by contrast, the property of the estate is generally limited to the debtor's "legal or equitable interests * * * in property as of the commencement of the case." 11 U.S.C. § 541(a)(1); see also 11 U.S.C. § 541(a)(6) (excluding "earnings from services performed by an individual debtor after the commencement of the case" from the property of the estate under Chapter 7).

Section 1307(a) authorizes a debtor to convert a Chapter 13 case to a Chapter 7 case "at any time." 11 U.S.C. § 1307(a). Several other Bankruptcy Code provisions govern the "effect of conversion." Most relevant here is Section 348(f), through which Congress "expresse[d]" its "preference as to what property belongs to a debtor after conversion." *In re Michael*, 699 F.3d at 309. That provision specifies that a conversion from Chapter 13 to Chapter 7 redefines the property of the estate to comprise only such property that both existed when the debtor commenced his case *and* remains in his possession or control. More specifically, Section 348(f)(1)(A) provides:

> Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to

> a case under another chapter under this title * * * *property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition*, that remains in the possession of or is under the control of the debtor on the date of the conversion.

11 U.S.C. § 348(f)(1)(A) (emphasis added).

Thus, the statute expressly limits the property of a converted estate to the property the debtor held on the date he filed his original bankruptcy petition. In effect, this provision resets the property of the estate to include only those assets that would have been included if the debtor had proceeded under Chapter 7 all along and that are still in his possession and control. Property and wages accumulated as "property of the estate" *after* "the date of filing of the petition" under Chapter 13 are excluded from the post-conversion estate going forward under Chapter 7.

The exception "provided in paragraph (2)" confirms what is plain on the face of Section 348(f)(1)(A). Paragraph (2) states that "[i]f the debtor converts a case under chapter 13 of this title to a case under another chapter under this title *in bad faith*, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion." 11 U.S.C. § 348(f)(2) (emphasis added). Thus, post-petition property is pulled into the converted estate only if the debtor has converted his case in bad faith.[3] It follows that where the

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[3] "An example of such a bad faith conversion would be when the debtor never had any intention of proceeding with a chapter 13 plan and filed the chapter 13 case solely to obtain

conversion is made in good faith, the debtor's post-petition property and wages are—as provided by Section 348(f)(1)(A)—*excluded* from the property of the converted estate. See *In re Michael*, 699 F.3d at 314. Such property "will normally revert to the debtor." 3 *Collier on Bankruptcy* ¶ 348.02, at 348-9. That is where this case should end.

The Fifth Circuit's review of the "statutory arguments" gave scant attention to Section 348(f). See Pet. App. 9a–22a. It noted that the statute does not "explicitly" direct a Chapter 13 trustee to return undistributed post-petition wages to the debtor upon conversion. *Id.* at 9a. But such a provision is entirely unnecessary, since Section 348(f)(1) defines the property of the estate upon conversion not to include post-petition wages. In any event, Congress's decision to create in Section 348(f)(2) an exception for bad-faith conversions, where the undistributed post-petition wages *would* be included in the estate, logically requires that those wages *would not* be included in the estate in good-faith conversions. See *In re Michael*, 699 F.3d at 308–309.

The Fifth Circuit observed, however, that in some cases a converting debtor who has earned post-petition wages may also possess *other* property that was acquired post-petition. The debtor's potential loss of *that other* property would adequately deter bad-faith conversion, the court suggested, even if

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delay, with the intention of converting at a later date to take advantage of Section 348(f). Other examples might be cases in which debtors fraudulently transferred estate property or dissipated estate assets in bad faith." 8 *Collier on Bankruptcy* ¶ 1306.04, at 1306-9.

post-petition wages held by the trustee are lost to creditors following any kind of conversion. Pet. App. 21a–22a. For that reason, the court concluded, at least "in most cases" allowing a Chapter 13 trustee to distribute post-petition wages to creditors after good-faith conversions would not render Section 348(f)(2)'s penalty against bad-faith conversions "superfluous." *Id.* at 22a.

With respect, the Fifth Circuit missed the point. A debtor's post-petition wages are *among* the post-petition property that Congress intended for debtors to retain upon a good-faith conversion to Chapter 7, and to lose to creditors through a Chapter 7 liquidation only upon a bad-faith conversion. See *In re Michael*, 699 F.3d at 315. It is no answer to say, as the court of appeals did below, that *enough* of Congress's intent is respected that it is acceptable to ignore *part* of Congress's design. Cf. *United States* v. *Vonn*, 535 U.S. 55, 72 (2002) (pointing to, as "reason to doubt that Congress could have intended" a particular result, "the tendency it would have to undercut the object" of a congressional enactment); *N.L.R.B.* v. *Bildisco & Bildisco*, 465 U.S. 513, 542 (1984) ("[A] construction that does not serve the goals of the statute is to be avoided unless the words chosen by Congress clearly compel it.") (internal quotation marks omitted). Nor is there any reason to believe that Congress, which pointedly failed to include any such exception for post-petition wages (although it would have been easy to do so), regarded the inclusion of post-petition wages in this scheme as too much of a good thing. At bottom, by holding that a debtor's post-petition wages go to creditors whether he converted in good faith or bad, the Fifth Circuit inexplicably treats sinners and saints alike,

notwithstanding Congress's decision to treat them differently.

2. The "background and legislative history" of Section 348(f) strongly "confirm this textual reading." *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). Congress enacted Section 348(f) in 1994 "to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7." H.R. Rep. No. 835, 103d Cong., 2d Sess. 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. Some lower courts had concluded that property of the estate acquired *during* a Chapter 13 case (including post-petition wages paid to the trustee) remained property of the estate notwithstanding conversion to Chapter 7. Congress enacted Section 348(f) to "overrule[]" those cases, and to "clarify" that the property a debtor acquires after filing a Chapter 13 petition does not remain property of the estate in a converted Chapter 7 case. *Ibid.* The decision below turns that clear congressional purpose on its head.

a. More than a decade before Congress added Section 348(f) to the Bankruptcy Code, the Eighth Circuit had concluded that post-petition wages paid to a Chapter 13 trustee remained property of the estate after conversion to Chapter 7 and were not subject to any statutory exemptions. *Resendez* v. *Lindquist*, 691 F.2d 397, 398–399 (1982). In the Eighth Circuit's view, those "funds were voluntarily paid to the Chapter 13 trustee," and it would be "unfair to the unsecured creditors" if they were not available for distribution in the converted case "on the basis that they had not been distributed." *Id.* at 399; accord *In re Lybrook*, 951 F.3d 136, 137, 138

(7th Cir. 1991) (relying on *Resendez*, and holding that "a rule of once in, always in" should apply to post-petition property included in the estate under Chapter 13 "to discourage strategic, opportunistic behavior" that risks giving a "windfall" to debtors); *In re Milledge*, 94 B.R. 218, 219–220 (Bankr. M.D. Ga. 1988); *In re Tracy*, 28 B.R. 189, 190 (Bankr. D. Me. 1983). Motivated by the same perceived policy concerns, other courts had achieved a similar result by authorizing Chapter 13 trustees to distribute to creditors any funds in their possession at conversion. *E.g.*, *In re Redick*, 81 B.R. 881, 883 (Bankr. E.D. Mich. 1987) (adopting this approach despite concluding that "[a] literal reading" of Section 348(a) dictated that undistributed funds "ought to be returned to the debtor" upon conversion); see also *In re Galloway*, 134 B.R. 602, 602–604 (Bankr. W.D. Ky. 1991); *In re Halpenny*, 125 B.R. 814, 815–816 (Bankr. D. Haw. 1991).

By contrast, the Third and Ninth Circuits had held that the property acquired by the debtor while proceeding under Chapter 13 did not remain property of the estate following conversion to Chapter 7. See *In re Bobroff*, 766 F.2d at 803 (concluding that this result also best accords with Congress's goal of "encouraging the use of debt repayment plans rather than liquidation"); *In re Plata*, 958 F.2d at 922 (expressly rejecting the reasoning in *Resendez*).[4]

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[4] The Ninth Circuit's decision in *In re Plata* construed provisions of Chapter 12, which is effectively Chapter 13 for family farmers and family fisherman. See *Hall* v. *United* States, 132 S. Ct. 1882, 1885 (2012) ("Chapter 12 was modeled on

b. By enacting Section 348(f), Congress rejected the very sorts of policy arguments advanced in *Resendez*, *Lybrook*, and *Redick*—and reprised by the Fifth Circuit and respondent here. It "resolve[d]" the debate in the lower courts by establishing the general rule that post-petition property is *not* included in the converted estate. H.R. Rep. No. 835, 103d Cong., 2d Sess. 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 3366. In response to concerns, expressed in *Lybrook* and elsewhere, that debtors might behave strategically, Congress also established the exception for cases in which the debtor converts his case "in bad faith." 11 U.S.C. § 348(f)(2).

The final House Report accompanying the bill that enacted Section 348(f) "clearly expressed" that "legislative intention."[5] *Burlington N. R.R. Co.* v. *Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987) (internal quotation marks omitted). In particular, the House Report recognized that several courts had "held that if the case is converted, * * * after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate do not

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Chapter 13.); see also *In re Horne*, No. 97-20171, 2002 WL 33939743, at *4 (Bankr. D. Idaho Jan. 10, 2002) (applying *In re Plata* to funds held by a Chapter 13 trustee upon conversion).

[5] Legislative reports have proven helpful in discerning Congress's intent in cases interpreting other provisions of the Bankruptcy Code. See, *e.g.*, *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 371–372 (2007) (analyzing House and Senate reports on the enactment of Section 706(a)). It is particularly illuminating here. See *In re Michael*, 699 F.3d at 314–315.

apply to chapter 7." H.R. Rep. No. 835, 103d Cong., 2d Sess. 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 3366. And yet other courts had "held that property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed." *Ibid.* Congress thus sided with those courts that had held that post-petition property should no longer be property of the estate in a case converted to Chapter 7. See *ibid.* The Report could hardly have been more explicit: "This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985)." *Ibid.*

This was, the House Report explained, a deliberate policy choice between the competing rationales offered for the decisions on either side of the existing split. Congress enacted Section 348(f) to avoid creating "a serious disincentive to chapter 13 filings" if post-petition property of the estate remained in the estate following conversion to Chapter 7. H.R. Rep. No. 835, 103d Cong., 2d Sess. 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 3366; see also *infra* pp. 35–39. And in response to concerns that revesting post-petition property in a debtor upon conversion might encourage strategic behavior, the Report explained that enacting Section 348(f)(2) would be enough to "give[] the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case." *Ibid.*

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The text of Section 348(f), especially given the clear purpose for which Congress enacted it, conclusively resolves the question presented. Congress intended that post-petition property of the estate in the Chapter 13 case should not be made available to creditors in the converted case.

B. Section 348(e) "Terminates" The Chapter 13 Trustee's "Service" Upon Conversion

Section 348(e) provides that conversion of a case from Chapter 13 to Chapter 7 "terminates the service of any trustee * * * serving in the case before such conversion." 11 U.S.C. § 348(e). That provision immediately removes the Chapter 13 trustee as "the representative of the estate" (11 U.S.C. § 323(a)) and as the disbursing agent of the former property of the estate in her possession (11 U.S.C. § 1326(c)). Accordingly, Section 348(e) incapacitates a Chapter 13 trustee from doing precisely what respondent did here: continuing to distribute a debtor's post-petition wages to creditors as if the conversion never happened. See *In re Michael*, 699 F.3d at 310 (holding that Section 348(e) "seemingly renders [the trustee] powerless to make payments to creditors under a Chapter 13 plan" after conversion); 3 *Collier on Bankruptcy* ¶ 348.06, at 348-21 ("Because a chapter * * * 13 trustee's service is terminated upon conversion by section 348(e), the trustee has no duty, right, or ability to disburse any funds that the trustee is still holding.").

"[W]hen a statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it

according to its terms." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1896 (2013) (internal quotation marks and brackets omitted). Section 348(e) could hardly be plainer. If Section 348(e) "terminates" *anything*, then surely it terminates the Chapter 13 trustee's authority to continue disbursing funds to creditors. The point of a Chapter 13 case, after all, is the trustee's distribution of a debtor's payments to creditors according to a confirmed plan. Section 348(e) conclusively "terminates" that "service" upon conversion.

The Fifth Circuit concluded, however, that Section 348(e) should not be taken "too literally." Pet. App. 10a (quoting *In re Parrish*, 275 B.R. at 430). "[T]here is no logical reason," the Fifth Circuit believed, "why distribution of funds pursuant to the previously confirmed reorganization plan cannot be included" among the Chapter 13 trustee's remaining "administrative duties" after conversion. *Id.* at 11a (quoting *In re Michael*, 699 F.3d at 320 n.8 (Roth, J., dissenting)). Respondent likewise "posits that 11 U.S.C. § 348(e) * * * cannot be taken too literally." Br. in Opp. 15.

With respect, the Fifth Circuit and respondent have Section 348(e) exactly backward. Following a conversion to Chapter 7, a Chapter 13 trustee has only a small handful of limited, carefully specified duties to carry out. First, "[a]fter qualification of, or assumption of duties by the chapter 7 trustee, any * * * trustee *previously acting* in the chapter 11, 12, or 13 case shall, forthwith, unless otherwise ordered, turn over to the chapter 7 trustee all records and property of the estate in the possession or control of the * * * trustee." Fed. R. Bankr. P. 1019(4)

(emphasis added). Second, the former Chapter 13 trustee "shall * * * transmit to the United States trustee a final report and account." Fed. R. Bankr. P. 1019(5); see also 11 U.S.C. § 1302(b)(1) (incorporating 11 U.S.C. § 704(a)(9)).

Those are "ancillary duties to clean-up and finalize the administration of the estate." *In re Michael*, 699 F.3d at 320. They are not a blank check *to continue* disbursing now-former property of the estate to creditors. Indeed, the requirement that, upon conversion, a Chapter 13 trustee must "turn over to the Chapter 7 trustee all * * * property of the estate" in her "possession or control" directs what a "previously acting" Chapter 13 trustee is supposed to do with any property in her possession that she believes remains available to creditors in the case. Fed. R. Bankr. P. 1019(4). By rule, she must give such property to the Chapter 7 trustee, *not* distribute it to creditors herself.

What is more, the Fifth Circuit's reading would deprive Section 348(e) of consistent meaning in all cases it governs. In a case proceeding under Chapter 7, a trustee has possession and control of *all* the property of the estate. 11 U.S.C. § 704(a)(1). Upon conversion to another chapter, a Chapter 7 trustee also has reporting and other ancillary obligations. See *id.* § 704(a)(9). Yet it would be absurd to suggest that those ancillary duties include distributing the entirety of the estate's property to creditors. That "service" indisputably "terminates" under Section 348(e) upon conversion from Chapter 7. There is no

reason to construe the statute differently when the conversion is from Chapter 13.[6]

Notwithstanding Section 348(e)'s termination of her "service" upon conversion, respondent contended below that Sections 1326(c) and 1327(a) vested creditors with an interest in the post-petition wages in her possession and thus provided her authority to distribute those funds to them. See Resp. C.A. Br. 23–30 & 30 n.5. Section 1326(c) provides that, "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan." Section 1327(a) likewise "bind[s] the debtor and each creditor" to the confirmed Chapter 13 plan. Each section applies, however, only to cases still proceeding "under" Chapter 13. 11 U.S.C. § 103(i) ("Chapter 13 of this title applies only in a case under such chapter."). Petitioner's case began proceeding under Chapter 7 upon conversion. It is axiomatic that "a Chapter 13 plan has no relevance to or import in a case under any other chapter." *In re Boggs*, 137 B.R. at 410; cf. Pet. App. 18a ("[C]reditors [do not] have a continuing right to payment under the plan after conversion.").[7]

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[6] Distribution of property of the estate is governed by a confirmed plan in Chapter 13, and by statute in Chapter 7. See 11 U.S.C. § 726. But that is a distinction without a difference for purposes of construing a statute that, upon conversion, "terminates the service of any trustee * * * serving in the case before such conversion." 11 U.S.C. § 348(e).

[7] Respondent also contended that Section 1326(a)(2) authorized her post-conversion distributions to creditors. That argument fails for the same reason, and for the additional

In short, Section 348(e) unambiguously terminated respondent's service as trustee in petitioner's case the moment petitioner converted his case to Chapter 7. Neither respondent's remaining "ancillary duties" to turn over the property of the estate and report on its administration, nor provisions of Chapter 13 that ceased to govern the case upon its conversion, provide any authority to distribute post-petition wages following such termination.

C. Section 1327(b) Vests Any Property Of The Estate Held By The Chapter 13 Trustee In The Debtor At Or Before Conversion

Section 1327(b) establishes a default rule that "vests all of the property of the estate in the debtor" upon confirmation of a Chapter 13 plan, "[e]xcept as otherwise provided in the plan or in the order confirming the plan." 11 U.S.C. § 1327(b). In this case, the confirmation order "otherwise provided" that "[s]uch property as may revest in the Debtor shall so revest only upon further Order of the Court or upon dismissal, *conversion*, or discharge." J.A. 48 (emphasis added). Accordingly, all the property of the estate under Chapter 13—whether in petitioner's possession or the trustee's, see 11 U.S.C. § 1306(b)—revested in petitioner when he converted his case to Chapter 7. That revesting of the estate's property—

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reason that Section 1326(a)(2) "does not apply to post-confirmation payments made by the debtor to the trustee," but rather to pre-confirmation payments not at issue here. Pet. App. 15a–17a; see also pp. 33–34 & n.8, *infra*.

whether it happens at plan confirmation or at a time "otherwise provided" for by the plan or confirmation order—thus gives the debtor an unambiguous, vested interest in post-petition wages held by a Chapter 13 trustee at conversion. See *In re Michael*, 699 F.3d at 313; see also *Nash* v. *Kester (In re Nash)*, 765 F.2d 1410, 1414 (9th Cir. 1985) (payments to a Chapter 13 trustee under a confirmed plan vested in the debtor per Section 1327(b)).

The Fifth Circuit, by contrast, misconstrued Section 1327(b), concluding that a confirmed plan's provision for a debtor's monthly payment to a Chapter 13 trustee "otherwise provide[s]" that such property of the estate shall *never* revest in the debtor. See Pet. App. 19a–21a & n.8. It is an "exception to [the] possession and vesting of title in [the] debtor," the court of appeals reasoned, "[that] indicate[s] that [the] debtor is to have *no continuing interest* in payments actually made pursuant to a confirmed plan." *Id.* at 20a (quoting *In re Lennon*, 65 B.R. 130, 136 (Bankr. N.D. Ga. 1986)) (emphasis added). But the court identified no statutory basis for treating property in a trustee's possession because of monthly payments different from property in petitioner's possession for purposes of revesting the property of the estate in petitioner "upon * * * conversion." J.A. 48.

In fact, the court of appeals correctly *rejected* respondent's principal statutory argument in support of that counterintuitive result. "Relying primarily on 11 U.S.C. § 1326(a)(2)," respondent had argued "that creditors obtain a vested right to receive payments pursuant to a confirmed Chapter 13 plan once the debtor transfers the payments to the trustee." Pet.

App. 14a; see also *id.* at 17a–18a. The Fifth Circuit squarely held that there is "no support for such a rule in the Bankruptcy Code or in any legislative history." *Id.* at 18a. As many other courts have also recognized, "[n]o provision in the Bankruptcy Code classifies any property, including post-petition wages, as belonging to creditors." *In re Michael*, 699 F.3d at 312-313; accord *In re Murphy*, Nos. 09-81861, 12-30813, 2014 WL 2600168, at *2 (Bankr. M.D. Ala. Feb. 11, 2014); *In re Boggs*, 137 B.R. at 409–410. Rather, "[a] Chapter 13 creditor's interests do not vest *until the monies are distributed*. Because the monies here in question were not distributed [prior to conversion], * * * [t]he debtors' interests in the monies [had] not been extinguished." *In re Plata*, 958 F.2d at 922 (quoting *Resendez*, 691 F.2d at 400 (Bright, J., dissenting)).

In particular, nothing in Sections 1326 purports to vest Chapter 13 creditors with a right to undistributed wages. Those provisions provide only that, upon plan confirmation, a trustee "shall distribute" any payments received before plan confirmation "in accordance with the plan as soon as is practicable," 11 U.S.C. § 1326(a)(2),[8] and that a

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[8] Several courts have recognized that Section 1326(a)(2) is "limited to postconfirmation distribution of the debtors' *preconfirmation* payments to a trustee." *Williams* v. *Marshall*, No. 13 C 2326, 2014 WL 1457828, at *4 (Bankr. N.D. Ill. Apr. 11, 2014); accord *Cohen* v. *Tran (In re Tran)*, 309 B.R. 330, 335 (Bankr. App. 9th Cir. 2004) ("[Section] 1326(a)(2) was not intended to address the disposition of funds received by a chapter 13 trustee after confirmation."); *In re Hamilton*, 493 B.R. 31, 35 (Bankr. M.D. Tenn. 2013) (citing cases).

"trustee shall make payments to creditors under the plan," 11 U.S.C. § 1326(c). That is to say, Congress was merely addressing "when plan payments are to begin, the disposition of funds in the event no plan is confirmed, and who is to handle the funds." *In re Boggs*, 137 B.R. at 410; accord *In re Nash*, 765 F.2d at 1413 n.1 (holding that what is now Section 1326(c) "was intended to address only the question of who should act as disbursing agent (debtor, trustee, or someone else) of the Chapter 13 plan funds") (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 430 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6386, and 5 *Collier on Bankruptcy* ¶ 1326.01[4], at 1326–1328 (15th ed., Lawrence P. King ed., 1985)).

In short, when petitioner converted to Chapter 7, all of his property—including all of his post-petition wages—was "[p]roperty of the estate." 11 U.S.C. § 1306(a). He possessed the bulk of that property, see 11 U.S.C. § 1306(b), but had remitted some of that property to the trustee's possession and control, see 11 U.S.C. § 1322(a)(1). The fact that *some* property of the estate is held by the trustee has no bearing on the debtor's vested interest in *all* of that property at or before conversion. *In re Michael*, 699 F.3d at 313; see also *In re Plata*, 958 F.2d at 922 (reaching the same conclusion under Chapter 12). Given its correct conclusion that no statute gave creditors any vested right to the property of the estate held by the trustee, the Fifth Circuit should have recognized that the plain meaning of Section 1327(b), and the confirmation order entered in this case, directed the revesting of those funds in petitioner and their refund to the rightful owner.

II. Post-Conversion Distributions Would Create Perverse Incentives Contrary To Congressional Intent

A. Post-Conversion Distributions Penalize Debtors For Proceeding Under Chapter 13

"Congress intended Chapter 13 proceedings to be entirely voluntary," *Tidewater Fin. Co.* v. *Williams*, 498 F.3d 249, 252 (4th Cir. 2007); a debtor cannot be compelled to commence *or to continue* a Chapter 13 case. Only the debtor can file a Chapter 13 case, see 11 U.S.C. §§ 301–303, and he enjoys the right to convert or (unless previously converted) to dismiss the case "at any time," 11 U.S.C. § 1307(a), (b). As one bankruptcy court put it:

> [M]ost Chapter 13 debtors literally volunteer to pay their creditors money they don't have to pay to realize bankruptcy relief. They could file Chapter 7 instead, walk away from all their debts without further payment and keep all future earnings from personal services free of the claims of prepetition creditors. By filing Chapter 13 instead, these individual debtors are voluntarily paying some or all of their dischargeable debt from future earnings that would otherwise be immune to the claims of their creditors.

In re Hamilton, 493 B.R. at 42.

An important purpose of the Bankruptcy Code is to encourage eligible individuals to make that election. Nearly half a century ago, addressing Chapter 13's predecessor—Chapter XIII of the Bankruptcy Act, Pub. L. No. 75-696, 52 Stat. 840,

930 (1938), as amended—this Court recognized that "Congress clearly intend[s] to encourage [individuals with regular income] to pay their debts in full, rather than to go into straight bankruptcy." *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 395 (1966). That is because in a liquidation, under what is now Chapter 7, "everyone los[es]—the creditors by receiving a mere fraction of their claims, the debtor by bearing thereafter the stigma of having been adjudged a bankrupt." *Ibid.* In enacting the current Bankruptcy Code, Congress doubled down on its enticement of debtors into Chapter 13. At every turn, the Code "encourages more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge." H.R. Rep. No. 595, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5966.

The reason is simple: Under Chapter 13, everyone wins. "The benefit to creditors is self-evident: Their losses will be significantly less than if their debtors opt for straight bankruptcy." H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. at 6079; see also *Perry*, 383 U.S. at 395–396 (recognizing that individual debtors "ordinarily have little or no assets available for distribution in straight bankruptcy," which results in creditors "receiving a mere fraction of their claims"). In particular, a Chapter 13 plan must provide for payments to unsecured creditors at least as great as the sum they would receive in a Chapter 7 liquidation. 11 U.S.C. § 1325(a)(4). In many cases, moreover, unsecured creditors stand to receive *nothing* in a liquidation; *something* is undoubtedly better than nothing. See, *e.g.*, *Wachovia Mortgage*, 478 B.R. at 560 ("[M]ost chapter 7 cases are actually

no asset cases, meaning that there is nothing to liquidate and unsecured creditors are never repaid.").

For debtors, Chapter 13 avoids the disruption of asset liquidation, affords them the opportunity to repay their debt over an extended period, and accordingly bestows less of a stigma. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. at 6079. Chapter 13 debtors are allowed to keep most of the property of the estate while they implement their plan (11 U.S.C. § 1306(b)), and they receive a discharge upon successful plan completion that is broader than the discharge available to Chapter 7 debtors.[9]

The principal risk of electing or continuing a Chapter 13 case is failure. The Chapter's primary benefits are largely lost to the debtor who does not successfully complete a confirmed Chapter 13 plan. In the meantime, the debtor will have contributed disposable income to the estate that would have been excluded from the estate's property in a case under Chapter 7. That risk is very real: The bulk of Chapter 13 plans are not successfully completed. Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103, 108 & nn.33–34 (2011). Debtors (and their counsel) are naturally attuned to these potential

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[9] Compare 11 U.S.C. § 727(b) with 11 U.S.C. § 1328(a). The so-called "super discharge" in Chapter 13 applies to certain debts that are not dischargeable in Chapter 7, including marital property settlements other than support, claims of willful or malicious injury to property, and certain civil fines, penalties, and forfeitures.

negative consequences that flow from having to convert or dismiss their Chapter 13 cases.

A severe penalty such as respondent's post-conversion distribution of $4,319 of petitioner's wages is a clear disincentive to proceeding under Chapter 13 in the first place. As one bankruptcy court remarked, "the Congressional policy of encouraging debtors to repay their creditors via Chapter 13 is furthered by debtors (and their counsel) knowing they will not be penalized for attempting Chapter 13." *In re Boggs*, 137 B.R. at 411. For debtors who are volunteering to put their future income at risk, it is important that undistributed wages will be returned to them if they must abandon their volunteerism through conversion. "This result furthers Congress's preference that on conversion to Chapter 7 a Chapter 13 debtor receive all post-petition property that is held by the Chapter 13 trustee, but still is under the control of the debtor, so that debtors are encouraged to attempt to repay their debtors through reorganization rather than liquidation." *In re Michael*, 699 F.3d at 316. The contrary "outcome," adopted by the court of appeals below, "would dissuade debtors from filing under Chapter 13." *Id.* at 315.

This case illustrates this powerful disincentive. As the district court recognized, respondent's post-conversion distributions created "precisely the kind of disincentive to file a Chapter 13 bankruptcy that Congress was trying to avoid." Pet. App. 48a. Until converting his case, petitioner had been making monthly payments to the Chapter 13 trustee for "over a year and a half" that "would not have been part of the Chapter 7 estate if Debtor had filed a

Chapter 7 petition originally." *Ibid.*; see also *DeHart* v. *Michael*, 446 B.R. 665, 669 (M.D. Pa. 2011), *aff'd*, *In re Michael*, 699 F.3d 305 (3d Cir. 2012) (holding post-confirmation distributions "reduce[] the incentive to attempt reorganization" under Chapter 13).

When respondent distributed $4,319 of those funds—eight months' worth of petitioner's total disposable income—to creditors, she deprived petitioner of the ability to use those funds to make his fresh start after Chapter 7. Petitioner had reported just $1,100 in cash savings when he filed his original petition, and since then had lost his house and his car. The refund of his undistributed wages would significantly boost petitioner's ability to pay his non-dischargeable debt (like his student loans), and otherwise to help him get back on his feet. Congress provided that any property and earnings the debtor acquired after commencing his case that remained undistributed would revert to the debtor upon conversion. That legislative judgment should be respected.

B. Post-Conversion Distributions Create An Illogical Disparity Between Debtors Who Convert And Those Who Dismiss

If upheld, the decision below would create an anomaly. It would give an improper windfall to creditors based solely on the procedural vehicle the debtor happened to choose for exiting Chapter 13. A debtor who *dismisses* a Chapter 13 case is plainly entitled to any post-petition wages held by the Chapter 13 trustee absent "cause." There is no

logical reason for a different rule to govern conversions.

"On request of the debtor at any time * * * the court *shall dismiss* a [Chapter 13] case." 11 U.S.C. § 1307(b) (emphasis added)). Section 349 governs the effects of such a dismissal; it provides that, "[u]nless the court, *for cause*, orders otherwise," the property of the estate revests in the debtor—including any post-petition wages held by the Chapter 13 trustee. 11 U.S.C. § 349(b)(3) (emphasis added).[10]

The Third and Ninth Circuits have rightly rejected the pointless formalism that would have undistributed funds treated differently upon conversion than upon dismissal. As Judge Ambro explained in *In re Michael*, "if a Chapter 13 debtor is concerned about obtaining funds held by the Chapter 13 trustee, he can dismiss his case rather than convert. As noted by the Ninth Circuit Court, we can discern 'no justification for requiring a debtor to dismiss, rather than convert'" to obtain those funds. 699 F.3d at 314 n.6 (quoting *In re Plata*, 958 F.2d at 922). "Aside from creating a trap for the unwary, such a requirement would merely elevate form over

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[10] In her Brief in Opposition (at 20), respondent contended that she "would have * * *, as she has in the past * * *, argued that funds in her possession at time of dismissal should be distributed to creditors as opposed to the Debtor." What respondent failed to state, however, is that the district court *rejected* her argument in the very appeal she cites (Opp. 20 n.7). See Memo. Op. 10, *Clark* v. *Viegelahn*, No. 12-CA-979, Doc. 7 (W.D. Tex. July 9, 2013) (holding that respondent's argument "creates a host of problems that evaporate when section 349 is fully respected"); see also *In re Nash*, 765 F.2d at 1414–1415.

substance and inject a needless degree of extra work on the part of all concerned." *Ibid.* (same).

What is more, a debtor who obtained undistributed funds from the trustee upon dismissal, and who met the eligibility requirements, could then file a new petition under Chapter 7. The new petition would create a new estate that included all of the cash in the debtor's control—including the recently refunded, now-*pre*-petition wages. 11 U.S.C. § 541(a). In most cases, however, the debtor would be entitled to exempt those funds from the new estate up to limits set by Section 522(d).[11] Thus, many debtors could avoid the anomalous result produced by the decision below by proceeding under the Code's dismissal provisions.

Suppose, for example, that petitioner had dismissed his Chapter 13 case under Section 1307(b), and upon doing so received the $4,319 held by respondent per Section 349(b)(3). If thereafter he had filed a new case under Chapter 7, he would have been able to exempt every penny of those funds from the resulting estate under 11 U.S.C. § 522(d)(5). See Bankr. Pet. Schedule C-1 (disclosing that petitioner had $7,646.91 in unused exemption under Section 522(d)(5) upon filing his petition under Chapter 13).

The Fifth Circuit offered no explanation for that obvious incongruity. It merely noted that dismissal and conversion are separate vehicles for exiting

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[11] More specifically, Section 522(d)(5) authorizes a debtor to exempt as much as $8,300 from the property of the estate ($800 plus up to $7,500 of any unused exemption for interests in real property under paragraph (d)(1)).

Chapter 13, and that they are governed by separate Code provisions. See Pet. App. 11a–12a. That fails to explain why Congress would have intended to employ the procedural difference as a trap for the unwary debtor who chooses between them unwisely. See *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A Court must * * * interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal citations and quotation marks omitted). Accordingly, even if the Bankruptcy Code leaves a gap to be filled by "considerations of equity and policy" (but see pp. 19–34, *supra*), the fair and equitable approach is to require Chapter 13 trustees to return undistributed funds to debtors upon conversion, just as they are required to upon dismissal.

C. Post-Conversion Distributions Upend Debtors' Superior Interest In Undistributed Wages

The Fifth Circuit believed that returning a debtor's post-petition wages to him if those wages are undistributed at conversion would provide to him a "windfall" and deprive creditors of their "*quid pro quo*" under the confirmed Chapter 13 plan. Pet. App. 25a–26a (quoting *In re Michael*, 699 F.3d at 319–320 (Roth, J., dissenting)). It does neither.

1. A refund to debtors upon conversion of their undistributed wages is not a "windfall." When a debtor remits wages to a Chapter 13 trustee under a confirmed plan, he does so only to complete that plan and obtain a discharge of his debts. But "[w]hen a Chapter 13 plan does not work out" and the debtor

converts to Chapter 7, "no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts by filing under Chapter 13." *Hannan* v. *Kirschenbaum (In re Hannan)*, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982); see also *In re Boggs*, 137 B.R. at 410–411.

Respondent has contended, however, that requiring those refunds will mean that creditors' ultimate recovery under a confirmed plan will turn—at least on the margins—on when a conversion notice falls during the trustee's distribution schedule. See Resp. C.A. Br. 20. That may well be true in some cases, but it is the direct and obvious result of Congress's decision to allow debtors to convert their Chapter 13 cases to Chapter 7 immediately and "at any time." 11 U.S.C. § 1307; see also Fed. R. Bank. P. 1017(f)(3). This "practical consequence" (*In re Michael*, 699 F.3d at 316) is thus fully consistent with the statutory scheme.

In any event, in this case it was petitioner's conversion notice that spurred respondent to schedule a distribution to creditors, not *vice versa*. Respondent had been accumulating funds earmarked for Chase for a year when, on November 21, 2011, petitioner converted his case to Chapter 7. It was only nine days *after* petitioner's conversion notice that respondent filed a local form stating her recommendation concerning the treatment of claims in the already-converted Chapter 13 case (J.A. 7–8, Doc. 34), and a day *after that* when she distributed the accumulated funds. Petitioner did not strategically time his conversion; if anything, respondent strategically timed her distribution to get

it in before her final report was due. Even if the facts were otherwise, Section 348(f)(2) is Congress's response to a debtor's attempt to "game the system" in bad faith, and it is undisputed that petitioner acted in good faith here. See pp. 8–9, *supra*; Pet App. 47a; *In re Michael*, 699 F.3d at 316.

Nor is the timing of conversion or distributions entirely in the debtor's control. If petitioner's unsecured creditors had believed they were entitled to the accumulating funds *during* the Chapter 13 proceedings, they could have moved to modify the plan to provide for their payment ahead of Chase. See 11 U.S.C. § 1329. No creditor did so. What is more, if unsecured creditors truly believed petitioner was using his Chapter 13 case as a "savings account," Pet. App. 42a (quoting Resp. D.C. Br. 23), they also could have moved to convert the case to Chapter 7 or to dismiss it. 11 U.S.C. § 1307(c). Again, no creditor did so. For these reasons, no "strong considerations of fairness" give creditors who slept on their rights any "superior" claims to petitioner's post-petition wages upon conversion. Pet. App. 26a, 28a.

2. As even the Fifth Circuit recognized, *nothing* in the Bankruptcy Code gives creditors a "vested right to receive * * * funds." *Id.* at 17a; see pp. 32–34, *supra*. Here, moreover, the bulk of the creditors to which respondent distributed funds after conversion had no entitlement under the confirmed plan to receive those payments from the estate so early in the case. See J.A. 30; Pet. App. 17a ("When [petitioner] converted to Chapter 7, [respondent] distributed the accumulated funds to other creditors, who would never have received them if they had

been distributed to Chase as originally intended."). As to those creditors in particular, the funds held by the trustee were neither *quid* nor *quo*.

What is more, this case demonstrates why it is odd to treat Chapter 13 payments held by the trustee as belonging to a creditor. Petitioner, like many debtors, converted his case from Chapter 13 to Chapter 7 precisely because the benefits he had hoped to receive under Chapter 13 did not materialize. When petitioner converted his case—just as when the debtor in *In re Michael* converted his, 699 F.3d at 307—he had already lost his home when Chase moved to lift the automatic stay, see Pet. App. 4a. Petitioner also did not "retain the use of his automobile," *id.* at 26a–27a (quoting *In re Michael*, 699 F.3d at 319): he had surrendered his car to the secured lender on his car loan, see *id.* at 27a n.12. Moreover, as in *In re Michael*, the funds the Chapter 13 trustee held at conversion had been deducted from the debtor's wages only *after* he had failed to "stave off foreclosure and cure the mortgage default." *Id.* at 26a (quoting *In re Michael*, 699 F.3d at 319 (Roth, J., dissenting)). In sum, by the time petitioner converted, the benefits offered by attempting to proceed in Chapter 13 had evaporated.

The Fifth Circuit's preferred policy rationale was also mistaken in emphasizing the purported "disadvantages" creditors "suffer[] as a result of [a Chapter 13] plan." Pet. App. 27a. Chapter 13 plans, by definition, provide unsecured creditors at least as much as they can expect to receive under standard Chapter 7 liquidation. See 11 U.S.C. § 1325(a)(4). Indeed, Chapter 13 puts such creditors in a *better* position because, during the pendency of the Chapter

13 plan, they enjoy the "benefit of distribution from debtors' wage contributions, which would not have been available to them under Chapter 7." Pet. App. 46a (quoting *In re Boggs*, 137 B.R. at 410). Creditors are virtually always better off if a debtor first attempts to proceed under Chapter 13 and then converts than they are if the debtor files immediately under Chapter 7.

Again, this case is instructive. When petitioner filed for bankruptcy protection, his only non-exempt assets were his home and his car. See Bankr. Pet. Schedule C-1. He gave up the car, and if he had filed his case under Chapter 7 from the start (or converted it months earlier than he did), then his home would have been sold, his mortgage lender would have received the proceeds, and the rest of his debts would have been discharged to the extent authorized by law. It was only petitioner's attempt to proceed under Chapter 13 in an effort to save his home that provided his other creditors any opportunity to recover anything at all. Ultimately, the only "harm" to the creditors was that petitioner did not see his Chapter 13 plan through to completion, but that was his choice—not his creditors'—under 11 U.S.C. § 1307(a).

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, when a debtor converts a chapter 13 bankruptcy case to one under chapter 7, funds that the debtor has voluntarily paid to the chapter 13 trustee for disbursement to creditors, but that have not yet been disbursed, revert to the debtor or should be distributed to creditors in accordance with the confirmed chapter 13 plan.

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Page(s)

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-595 (1977) 18

H.R. Rep. No. 103-835 (1994) 34

OTHER AUTHORITIES

28 *Am. Jur. 2d Escrow* (2000) 20, 21, 23

Bogert, George Gleason, et al., *The Law of Trusts and Trustees* (updated 2014) 25

30A *C.J.S. Escrows* § 23 (2007) 22

Carlson, David G., *The Chapter 13 Estate and Its Discontents*, 17 Am. Bankr. Inst. L. Rev. 233 (2009) 37

8 *Collier on Bankruptcy* (16th ed. 2014) 18, 31

Miller, Debra L & Katherine E. Iskin, *Clarifying the Mysterious Chapter 13 Disbursement Process*, 33 ABI J. 30 (2014) 29

Restatement (Second) Agency (1958) 20, 21

Restatement (Second) Trusts (1959) 24, 26

Restatement (Third) Trusts (2007) 25, 26

17 *Williston on Contracts* (4th ed. 2000) 22

IN THE

Supreme Court of the United States

No. 14-400

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT

This case presents the question whether, once a debtor has confirmed a chapter 13 plan and begun making payments to the trustee to be distributed to creditors, the debtor can reclaim payments that have not yet been distributed by converting the case to chapter 7. No provision of the Bankruptcy Code answers this question expressly. But the overarching structure and purpose of chapter 13, together with the established common-law principles that inform its interpretation, make clear that once a debtor has proposed a repayment plan, the plan has been confirmed, and the debtor has paid money to the trustee for distribution to creditors under that plan, the creditors—not the debtor—are entitled to those funds in the event of conversion.

A. Statutory Framework

Individual debtors may seek bankruptcy relief under either chapter 7 or chapter 13 (or, for some high-income debtors, chapter 11) of the Bankruptcy Code. Both chapters 7 and 13 are relevant here.

1. Under chapter 7, the debtor must surrender all of his nonexempt assets to the chapter 7 trustee for liquidation. Specifically, the filing of a chapter 7 petition creates a bankruptcy estate composed of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). With certain narrow exceptions, property acquired by an individual debtor after the date of filing, such as the debtor's postpetition wages, "is generally not included in the estate." Pet. App. 5a; *see* 11 U.S.C. §541(a).

During the bankruptcy case, property in the bankruptcy estate is protected from creditors' claims. The filing of the petition itself acts as an automatic stay of any action to enforce a prepetition claim against the debtor or any property of the estate, 11 U.S.C. §362(a)(1), (2), (4), (6) or otherwise to "exercise control over property of the estate," *id.* §362(a)(3). The automatic stay ensures that the trustee can marshal and distribute the debtor's assets without disruption and that creditors are not forced to compete in a "race to the courthouse" to enforce their claims.

An individual debtor may exempt certain assets—*e.g.*, a certain amount of equity in a residence or a vehicle—from the estate and thus from creditors' claims. 11 U.S.C. §522. If there is any nonexempt estate property (in most chapter 7 cases, there is none), the chapter 7 trustee sells that property and distributes the proceeds according to creditors' statutory priority. Creditors

who wish to receive a distribution from the estate must file a proof of claim, which is deemed allowed unless a party in interest objects. *Id.* §§501, 502. If a party in interest objects, the bankruptcy court determines whether the claim should be allowed, generally by applying nonbankruptcy law. *See id.* §502(b).

In return for surrendering nonexempt prepetition assets for distribution to creditors, the chapter 7 debtor may receive a discharge of certain prepetition debt, meaning that after the bankruptcy those creditors can no longer pursue the debtor for payment on their claims, whether or not they received a distribution in the chapter 7 case. 11 U.S.C. §§524, 727; *see Law* v. *Siegel*, 134 S. Ct. 1188, 1192 (2014).[1] While the chapter 7 debtor must relinquish his nonexempt prepetition property, he is entitled to keep any property he acquires after bankruptcy free of prepetition creditors' claims.

2. Chapter 13 works quite differently. "[A] Chapter 13 filing proposes a plan to pay creditors with future income rather than liquidation of existing assets," as would occur in chapter 7. Pet. App. 5a. Under chapter 13, eligible individual debtors with a regular income may retain their prebankruptcy assets, propose a plan to repay prepetition creditors over time from their income going forward, and receive a discharge of certain prepetition debts upon completion of the repayment plan. *Hamilton* v. *Lanning*, 560 U.S. 505, 508 (2010).

In a chapter 13 case, the bankruptcy estate is thus comprised not only of the debtor's interests in property "as of the commencement of the case," 11 U.S.C.

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[1] In certain circumstances, a discharge may be denied, *see* 11 U.S.C. §727, and certain debts are nondischargeable, *see id.* §523.

§541(a)(1), but also "earnings from services performed by the debtor after the commencement of the case, but before the case is closed, dismissed, or converted to a case under chapter 7, 11 or 12 of this title, whichever occurs first." *Id.* §1306(a).

Moreover, unlike in chapter 7, unless a confirmed plan provides otherwise, the debtor "remain[s] in possession of all property of the estate" during the bankruptcy case. 11 U.S.C. §1306(b). Accordingly, the role of the trustee in a chapter 13 case is different from the role of a chapter 7 trustee. Unlike the chapter 7 trustee, the chapter 13 trustee generally does not take possession of and liquidate the debtor's property to make distributions to creditors. Rather, the debtor himself is charged with the rights and duties of a trustee with respect to the property of the estate in his possession.

The lynchpin of any chapter 13 case is the plan. A chapter 13 debtor is required to file a proposed plan for repayment of his creditors promptly after the petition date. 11 U.S.C. §1321; Fed. R. Bankr. P. 3015(b) (plan must be filed within 14 days of petition).

Although the debtor and his creditors may negotiate over the creditors' treatment in the plan, the Code contains certain substantive requirements that must be met for a plan to be confirmed over a creditor's objection. For secured creditors (other than the holder of a mortgage on the debtor's principal residence, whose rights typically cannot be modified in chapter 13, *see* 11 U.S.C. §1322(b)(2)), the plan must provide either that the debtor will surrender the collateral to the creditor or that the creditor will receive the full value of its collateral under the plan and will retain its lien until the underlying debt is paid in full or the debtor is discharged. *Id.* §1325(a)(5). For unsecured creditors, the

plan must provide either that they are paid in full, or that all of the debtor's projected disposable income during the three- or five-year plan period will be dedicated to repaying their claims. *Id.* §1325(b)(1).

Confirmation of a plan marks a sharp divide in the relationship between the debtor and his creditors. Prior to confirmation, that relationship is governed by rules set forth in the Bankruptcy Code. For one thing, the filed plan must "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. §1322(a)(1). And in the period after the plan is filed—even before confirmation—the debtor is required to begin making periodic payments from those funds to the trustee. "Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the [petition date], whichever is earlier, in the amount ... proposed by the plan to the trustee." *Id.* §1326(a)(1)(A).

While the trustee collects these amounts before confirmation, they may not be disbursed to creditors until a plan is confirmed. "A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or the denial of confirmation." 11 U.S.C. §1326(a)(2). If a plan is confirmed, the trustee is obligated to begin making distributions "as soon as is practicable." *Id.* If a plan is not confirmed, the trustee is generally required to return the funds to the debtor. *Id.*

Following plan confirmation, the basic relationship between a debtor and his creditors is governed by the confirmed plan. A confirmed plan is a contract between the debtor and creditors that "bind[s] the parties, gen-

erating benefits and corresponding responsibilities." *In re Michael*, 699 F.3d 305, 320 (3d Cir. 2012) (Roth, J., dissenting); *see* 11 U.S.C. §1327(a) ("The provisions of a confirmed plan bind the debtor and each creditor."). Following confirmation, the debtor is obligated to make payments to creditors pursuant to the plan, and creditors are bound by their treatment under the plan. Indeed, even a substantively unlawful provision of a plan is fully binding on and enforceable against creditors, once the order confirming the plan has become final and non-appealable. *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 268-271 (2010).

Because the amount the debtor is required to pay to the trustee for the purpose of repaying creditors is based on the debtor's projected disposable income over the plan period, *see* 11 U.S.C. §1325(b)(1), the plan can be modified, at the request of the debtor, the trustee, or an unsecured creditor, with court approval, in the event the debtor's financial condition changes (either for better or for worse) during the repayment period. *Id.* §1329.

Upon confirmation, the debtor typically regains title to property of the estate. "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of the a plan vests all of the property of the estate in the debtor." 11 U.S.C. §1327(b). Thus, after confirmation, although the plan requires the debtor to make payments out of his future income to the trustee to satisfy creditors' claims, *see id.* §1322(a)(1), except to the extent the plan provides otherwise the debtor has full right and title to, and control over, all of his prepetition and postpetition property.

As in chapter 7, creditors who seek to receive a distribution under the plan on account of their prepetition claims must file a proof of claim, to which parties in in-

terest may object. The chapter 13 trustee then makes payments to creditors holding allowed claims under the terms of the plan.

Plan confirmation in chapter 13 may occur soon after the case is initiated, before creditors' claims can be adjudicated. *See* 11 U.S.C. §1324(b) (plan confirmation hearing must be held no later than 45 days after initial meeting of creditors); Fed. R. Bankr. P. 3002(c) (proofs of claim must be filed no later than 90 days after initial meeting of creditors). In cases in which the claims allowance process is not yet finished at the time of plan confirmation, the trustee will be required to await the conclusion of that process to determine the amount each creditor is entitled to receive under the plan.

Upon completion of the plan, the debtor may obtain a discharge of certain prepetition debt. 11 U.S.C. §1328.[2] Because under chapter 13 a debtor can obtain a discharge while still keeping his prepetition property, such as a house or car, debtors who have meaningful prepetition assets often choose to seek relief under chapter 13 rather than chapter 7. Chapter 13 is thus designed to benefit both creditors, who must receive at least as much as they would in a chapter 7 liquidation, *id.* §1325(a)(4), and debtors, who are able to keep their prepetition property that would otherwise be sold to pay claims. *See Michael*, 699 F.3d at 319 (Roth, J., dissenting) (payments to creditors under a chapter 13 plan "are the *quid pro quo* that that debtor ... give[s] up during the pendency of the reorganization in return for being permitted to stave off foreclosure and cure the mortgage default [or] retain the use of his automobile").

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[2] As in chapter 7, the debtor can be denied a discharge under some circumstances, 11 U.S.C. §1328, and some debts are nondischargeable, *id.* §523.

Not all debtors successfully complete their chapter 13 plans, however. Chapter 13 debtors who are eligible to be chapter 7 debtors may thus convert their chapter 13 cases to chapter 7 or dismiss them if they cannot complete their plans. 11 U.S.C. §1307(a), (b). The bankruptcy court may also convert or dismiss a chapter 13 case at the request of a party in interest for cause, including the debtor's default on his obligations under the plan. *Id.* §1307(c). When a chapter 13 case is converted to chapter 7, the chapter 7 estate consists of the estate property that existed at the time the chapter 13 petition was filed, *id.* §348(f)(1)—which means that it does not include the debtor's postpetition income—unless the debtor converts in bad faith, *id.* §348(f)(2).

B. Facts And Proceedings Below

1. Having fallen behind on his home mortgage loan, petitioner filed a chapter 13 bankruptcy petition on February 24, 2010. JA1. That same day, he filed a proposed chapter 13 plan. JA26. The bankruptcy court confirmed the proposed plan on April 15, 2010. JA43.

The confirmed plan obligated the debtor to make monthly payments to the "supervision and control of the Chapter 13 Trustee" in "an amount equal to the Debtor's monthly disposable income or an amount sufficient to pay the claims of general unsecured creditors in full over the term of the plan." JA26. Specifically, the plan required the debtor to pay the trustee $530 per month for distribution to creditors. JA37. The plan also provided, contrary to the default rule provided by §1327(b), that "[u]pon confirmation of the plan, all property of the estate shall not vest in the Debtor(s), but shall remain as property of the estate subject to the automatic stay of 11 U.S.C. §362." JA31.

In a section entitled "Payment of Claims," the plan established a clear contractual entitlement of creditors to the plan payments: "Allowed claims shall be paid to the holders thereof in accordance with the terms hereof. From the monthly payments described above, the Chapter 13 Trustee shall pay the following allowed claims in the manner and amounts specified." JA27. The plan then set forth general provisions for the order of payment of administrative expenses, priority claims, secured claims, and unsecured claims. JA28-29.

Of the $530 paid to the trustee each month, $352 was to go to the debtor's mortgage lender, Chase Manhattan, to cure the amount by which the debtor had fallen behind on his mortgage prior to bankruptcy. *See* 11 U.S.C. §1322(b)(5) (chapter 13 plan may provide for "curing of any default ... and maintenance of payments while the case is pending" on long-term secured debt). Another $75.34 a month was to be paid to a consumer electronics store (a secured creditor) until that claim was paid off. JA34. The debtor's attorney was also to be paid $100 a month to satisfy attorney's fees of $3,000. JA39. The plan mandated that all remaining funds would be used to pay off $20,458 in unsecured debt. JA36-37. In addition, the plan required the debtor to continue to make regular monthly mortgage payments of $960 directly to Chase to maintain the mortgage while the case was pending. JA34; *see* 11 U.S.C. §1322(b)(5).

The effect of the plan that the debtor proposed and the bankruptcy court confirmed was thus—as chapter 13 requires—to commit all of the debtor's monthly disposable income to his creditors for the purpose of paying off his debts. No provision in the plan provided for the return of plan payments to the debtor in any circumstance.

Later in 2010, the debtor fell behind on the home mortgage payments he was required to make directly to Chase under the plan. On October 13, 2010, Chase filed a motion for relief from the automatic stay, which would permit Chase to begin foreclosure proceedings. JA4. The court lifted the stay on November 9, 2010. JA6.

Because the confirmed plan directed the trustee not to make payments to any creditor given permission to foreclose (JA32), the trustee stopped making the distributions to Chase on account of the debtor's mortgage arrearages, and instead retained in her possession $352 of the $530 she received monthly from the debtor (Pet. App. 4a). The trustee did not distribute these funds to other creditors at this time (though the plan would have authorized her to do so), but rather held them in reserve.

The reason for holding the funds in reserve was that chapter 13 debtors who are unable to meet their mortgage obligations will commonly reach agreements with their mortgage servicers to modify their mortgage loans, which would be the type of post-confirmation change in financial circumstances that would warrant a plan modification. 11 U.S.C. §1329. By reserving the amounts that had been provided to pay the mortgage arrearage, the Trustee effectively kept those funds available to meet the debtor's mortgage obligations in the event such an agreement was reached. *See* Hearing Transcript 14-15, *In re Harris*, No. 10-50655, Doc. 52 (Bankr. W.D. Tex. Feb. 14, 2010) (*Harris* Tr.). In the absence of such a plan modification, however, the confirmed plan provided that those funds should be distributed to satisfy other allowed claims. JA 27-30.

Here, the debtor never reached a modification agreement with his mortgage lender. More than one

year after the bankruptcy court granted stay relief, on November 21, 2011, the debtor filed a notice to convert his bankruptcy case to a case under chapter 7. JA7. On November 22, 2011, the bankruptcy court entered an order converting the case. *Id.*

At the time of conversion, the trustee was therefore holding $5,519.22 that the debtor had paid to her for distribution to creditors under the confirmed plan, but that had not yet been distributed to creditors. Pet. App. 4a, 31a. On November 22, 2011, the trustee paid $1,200 of those post-confirmation, pre-conversion payments to debtor's attorney, leaving $4,319.22 in her possession. *Id.*[3] On December 1, 2011, the trustee distributed the remaining funds to creditors pursuant to the plan, paying $397.78 on the secured consumer electronics loan and $3,578.78 to unsecured creditors. *Id.* The remaining $267.79 was paid as a trustee's fee. *Id.*

2. On December 29, 2011, the debtor filed a motion seeking to compel the trustee to return the $4,319 she had distributed to creditors. JA9. Following a hearing, the bankruptcy court granted the motion. JA9-10, 40. The bankruptcy court held that §348(e) of the Bankruptcy Code divested the trustee of authority to distribute plan payments to creditors upon conver-

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[3] A prior decision of the bankruptcy court, which adopted essentially the same reasoning the debtor advances here, had held that undistributed funds held by the chapter 13 trustee revert to the debtor, and that the debtor may assign those funds to pay for fees associated with converting a chapter 13 case to chapter 7. *See In re Zamora*, 274 B.R. 268 (Bankr. W.D. Tex. 2002). The debtor had made an assignment in this case. Pet. App. 31a. Although the rationale supporting *Zamora* is flawed for the same reason as the judgment under review, in light of that precedent the trustee honored the assignment and paid the debtor's attorney's fees. That payment is not encompassed by the judgment now before this Court and thus not at issue here.

sion, even with respect to payments made to the trustee prior to conversion. *Harris* Tr. 22, *citing* 11 U.S.C. §348(e). The trustee appealed to the district court.

3. The district court affirmed. Pet. App. 34a. In doing so, it relied chiefly on §348(f) of the Code, which provides that property acquired by a debtor postpetition does not become part of the chapter 7 estate at conversion. *Id.* 43a. Finding that Congress enacted §348(f) to encourage debtors to attempt chapter 13, the court concluded that the same policy concern resolved the question of who, as between the debtor and chapter 13 creditors, should receive undistributed payments held by a chapter 13 trustee upon conversion. *Id.* 43a-48a. The trustee appealed that decision to the court of appeals.

4. The Fifth Circuit reversed. Pet. App. 3a. The court of appeals rejected the conclusion that §348(f) resolved the question before it, explaining that §348(f) means only "that any funds paid by the debtor to the trustee pursuant to the Chapter 13 plan that have not been distributed at the time of conversion are not transferred to the Chapter 7 estate." *Id.* 9a. The court explained that "[n]o statute explicitly states what should happen to [the] funds" at issue here—that is, funds received by the chapter 13 trustee but not yet distributed to creditors at the time of conversion. *Id.* The court also held that §348(e) did not decide the question: Although §348(e) terminates the service of the trustee, even under the debtor's theory, the trustee "has a responsibility to distribute the remaining funds in her possession" to the party entitled to the funds. *Id.* 11a.

The Fifth Circuit held that the structure and purpose of the Bankruptcy Code required that postconfirmation, pre-conversion plan payments be paid to

creditors, not the debtor. The court explained that disbursing undistributed funds to creditors did nothing to frustrate Congress's goal of encouraging debtors to pursue chapter 13 relief and that doing so did not penalize debtors in any way. Pet. App. 24a-25a. In addition, the court observed that a confirmed plan imposes on the debtor a binding obligation to make payments to the trustee in exchange for the benefits provided by chapter 13. *Id.* 24a-26a. Moreover, there is a "crucial difference" between amounts already paid to a trustee under a confirmed plan and property that is still in the debtor's possession upon conversion. *Id.* 26a (quoting *Michael*, 699 F.3d at 319 (Roth, J., dissenting)). Because, until conversion, the debtor had enjoyed the benefits of chapter 13, the Fifth Circuit concluded that the debtor could not, after conversion, retroactively recover payments that had been made under the plan but not yet disbursed to creditors. *Id.* 27a-28a.

SUMMARY OF ARGUMENT

A chapter 13 trustee who is holding funds paid by a debtor under a confirmed plan holds those funds, in effect, as an escrow agent or a common-law trustee. No provision of the Bankruptcy Code speaks directly to the disposition of those funds upon conversion of a chapter 13 case to chapter 7. But background common-law principles provide a clear answer. Whether viewed through the lens of escrow or the law of trusts, following confirmation of a plan and the resolution of any contingencies in the plan regarding creditors' rights to payment, the trustee holds funds paid by a debtor under a plan for the benefit of creditors. The trustee is thus obligated to distribute those funds to creditors even after conversion.

That conclusion also honors the basic bargain of chapter 13, under which a debtor is permitted to keep his property, avoid repossession or foreclosure, and otherwise enjoy the benefits of chapter 13 so long as he is meeting his obligation to make payments required by the plan. It is also supported by textual provisions indicating that a debtor no longer has any residual interest in funds he has paid to a trustee with the expectation that the trustee would disburse those funds to creditors.

Petitioner's various statutory arguments are unavailing. Section 348(f) of the Bankruptcy Code makes plain that upon conversion, property of the chapter 13 estate does not become property of the chapter 7 estate. That principle is uncontroversial, but it does nothing to answer the question whether such funds should revert to the debtor or be distributed to creditors under the plan. Nor is petitioner aided by his reliance on §348(e), which states that conversion terminates the service of the chapter 13 trustee. No one contends that the trustee should keep for herself funds that have not been distributed—she must distribute them to someone, either to the debtor or to creditors. That the trustee's service is terminated, then, does nothing to answer the question presented. And §1327 is equally unhelpful to the petitioner. That section explains that upon confirmation, any property of the estate as to which the plan is silent should revert to the debtor. But funds the debtor paid to the trustee under the plan are not affected by this provision. As to the funds at issue here, the plan is far from silent—to the contrary, it expressly requires that they be paid to creditors. Section 1327's default rule that property whose disposition is not addressed in the plan reverts to the debtor on confirmation thus does not apply to the funds at issue here.

The various arguments petitioner makes from the purposes of the Bankruptcy Code also fail. In any given case, whether a trustee is holding funds that are to be, but have not yet been, distributed to creditors will be a function of happenstance. The disposition of such funds thus cannot meaningfully affect any debtor's incentive to file for chapter 13 in the first instance. Indeed, a rule that required such funds to be returned to the debtor would simply cause trustees to make more frequent distributions to creditors, at greater administrative expense. No principle of bankruptcy policy should require that result.

ARGUMENT

I. POST-CONFIRMATION, PRE-CONVERSION PAYMENTS BELONG TO CREDITORS

The text, structure, and purposes of the Bankruptcy Code—read in light of common-law principles governing arrangements where property is held by one party to be distributed to another—establish that a debtor has no remaining property interest in post-confirmation payments voluntarily made to a chapter 13 trustee under a confirmed plan. Rather, a debtor's creditors are entitled to those funds, regardless of whether they have yet been distributed. And nothing in the Bankruptcy Code retroactively alters the status of those funds upon conversion to chapter 7. Those principles decide this case.

A. Trustees Hold Post-confirmation, Pre-conversion Payments Effectively As Escrow Holders Or Common-law Trustees

No single provision in the Bankruptcy Code speaks directly to whether debtors or creditors have the right to post-confirmation, pre-conversion funds held by a

chapter 13 trustee upon conversion. *But see* Pet. Br. 18 (asserting the statutory text is "pellucid"). But "[s]tatutory construction is a holistic endeavor," *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks omitted), meaning that the Court "must ... interpret the statute as a symmetrical and coherent ... scheme, and fit, if possible, all parts into an harmonious whole," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). Read as a whole and against background common-law principles, the text and structure of chapter 13 establish that, after plan confirmation and once creditor claims are allowed or disallowed, a chapter 13 trustee effectively acts as a "disbursing agent"—specifically, an escrow holder or common-law trustee—for the purpose of making required and ministerial payments to creditors.

Several interlocking provisions of the Code support that conclusion by establishing (i) the role that a trustee plays as a disbursing agent and (ii) the contractual nature of a confirmed plan—features of chapter 13 that are necessary to understand the relative property interests of debtors and creditors in plan payments.

1. The trustee's role

As discussed above, a debtor who elects to proceed under chapter 13 is required to file a plan, 11 U.S.C. §1321, which, if confirmed, creates a contractual relationship between the debtor and creditors. Among other things, the plan "shall provide for the submission of all or such portion of future earnings ... of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." *Id.* §1322(a)(1).

Chapter 13 strikes an express bargain between debtors and creditors: "Chapter 13 debtors are permitted to keep their property, but they must agree to a court-approved plan under which they pay creditors out of their future income" over a period of up to five years. *Hamilton* v. *Lanning*, 560 U.S. 505, 508 (2010) (citing 11 U.S.C. §§1306(b), 1321, 1322(a)(1), 1328(a)). To ensure that a debtor lives up to his end of the bargain, the Code requires the debtor to begin making plan payments within 30 days of filing the proposed plan, even if the plan has not yet been confirmed. 11 U.S.C. §1326(a)(1). With a few exceptions, pre-confirmation plan payments must be made to the chapter 13 trustee. *See id.* §1326(a)(1)(A).

The chapter 13 trustee "retain[s]" those payments until plan confirmation. 11 U.S.C. §1326(a)(2). The Code then sets forth the conditions under which such pre-confirmation funds should be paid to creditors or returned to debtors: "If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable." *Id.* On the other hand, if a plan is not confirmed, the trustee is generally required to return such payments to the debtor. *Id.*

After a plan is confirmed, the debtor often makes plan payments to the trustee, who then pays creditors according to the terms of the confirmed plan. 11 U.S.C. §1326(c). But, importantly, the Code does not prohibit a chapter 13 debtor from paying creditors directly; after confirmation, the debtor may in some circumstances serve as the disbursing agent rather than channeling his payments through the trustee. *See, e.g.*, *id.*; *see also* *In re Aberegg*, 961 F.2d 1307, 1309 (7th Cir. 1992); *In re Foster*, 670 F.2d 478, 486 (5th Cir. 1982).

Thus, after plan confirmation, "the trustee"—or in some circumstances, the debtor—"serves as the disbursing agent of all payments to creditors." 8 *Collier on Bankruptcy* ¶1326.04 (16th ed. 2014). Both the legislative history of chapter 13, *see* H.R. Rep. No. 95-595, at 430 (1977) ("After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay it, or part of it, to the trustee, who will serve as the disbursing agent under 1326."), and the Bankruptcy Rules, *see* Fed. R. Bankr. P. 3021 ("after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed"), reflect that, once the plan is confirmed, the trustee serves substantially as a conduit for transmitting funds from the debtor to creditors.

2. The contractual nature of a confirmed plan

Plan confirmation is important in an additional respect: After confirmation, the rights and responsibilities of creditors and debtors are essentially a matter of contract. "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. §1327(a). A confirmed plan is thus "a new and binding contract ... between the debtors and their pre-confirmation creditors." *In re Murphy*, 474 F.3d 143, 148 (4th Cir. 2007) (brackets omitted); *see In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000) (similar). Indeed, even plan terms that are inconsistent with the Code are binding on all parties that receive constitutionally sufficient notice, once a confirmation order becomes final and non-appealable. *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269-271 (2010).

In those ways, the text and structure of chapter 13 establish that a trustee serves as a disbursing agent with respect to plan payments after confirmation—an agent who is bound to carry out the terms and conditions of a contract between the debtor and his creditors.

B. Under The Common Law Of Escrow Or Trust, Creditors Are Entitled To Post-confirmation, Pre-conversion Payments

The Code does not expressly state who, as between debtors and creditors, has the right to post-confirmation payments that happen to be in the hands of a chapter 13 trustee at the time of conversion. The Code does, however, create a clear structural relationship among debtors, chapter 13 trustees, and creditors, in which a debtor voluntarily relinquishes property to the trustee to be paid to creditors. And, "except when a statutory purpose to the contrary is evident," the provisions of the Code governing that relationship should be read to be consistent with "long-established and familiar" common-law "principles." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *see United States* v. *Texas*, 507 U.S. 529, 534 (1993) (statute should not be read "to abrogate a common-law principle" unless it "speak[s] directly to the question addressed by the common law" (internal quotation marks omitted)).

Here, familiar common-law principles governing comparable situations in which an intermediate party holds property provided by party A to be distributed to party B establish that, with respect to post-confirmation, pre-conversion plan payments, a chapter 13 trustee effectively acts as an escrow holder or a common-law trustee. Under either framework, long settled common-law rules establish that the property at issue belongs to creditors, not the debtor.

1. Escrow holder

The role of the chapter 13 trustee is analogous to that of an escrow holder. An escrow is "money ... delivered to a person, the holder, by another and which the holder contracts to retain until the happening or non-happening of an event; if the event happens, or fails to happen ... the escrow is to be delivered to a third person; otherwise he is to return it to the depositor." *Restatement (Second) Agency* §14D cmt. a (1958); *accord Love* v. *Brown Dev. Co.*, 131 So. 144, 146 (Fla. 1930) (similar).

An escrow relationship is contractual. "The purpose of an escrow is to assure the carrying out of an obligation already contracted for, and in furtherance of that obligation the promisor deposits money ... with an escrow agent who agrees to part with it only on a specified condition." 28 *Am. Jur. 2d Escrow* §2, at 6 (2000). Thus, "[i]n order to create an escrow there must first be a binding agreement between the parties subject to it." *Restatement (Second) Agency* §14D reporter's notes.

As shown above, the Code effectively assigns to the chapter 13 trustee the role of an escrow holder. The trustee "retain[s]" plan payments before confirmation. 11 U.S.C. §1326(a)(2). After confirmation, the plan is the binding agreement under which the debtor makes payments to the trustee, to be held for creditors.

The right of a particular creditor to a particular amount, however, may remain contingent even following plan confirmation. As an initial matter, until the claims allowance process is completed, the right of any given creditor to a particular share of the payments made to the trustee is contingent on the completion of that process, through which each creditor's allowed claim becomes fixed. 11 U.S.C. §502.

Under the plan in this case, the amount to which unsecured creditors were entitled depended on the amount to be paid to secured creditors. That is, unsecured creditors would receive the balance of funds paid to the trustee after payment of secured (and priority) claims. JA30, 34-36. The plan also provided that if a mortgage creditor obtained stay relief, the trustee should not make further distribution to that secured creditor. JA32. As described above, when the mortgage lender here obtained relief from the stay, the trustee thereafter held the funds otherwise dedicated to repaying the mortgage lender's arrearage, to provide the debtor the opportunity to negotiate a modification.

On November 21, 2011, the debtor provided public notice of his intent to convert the case to chapter 7. Any outstanding contingencies were thus removed. At that point, at the latest, the trustee had a legal obligation to distribute undisbursed funds to creditors under the plan. *See* 11 U.S.C. §1326(a), (c); JA27 ("From the monthly payments described above, the Chapter 13 Trustee shall pay the following allowed claims in the manner and amounts specified.").

Understanding the chapter 13 trustee as common-law escrow holder resolves the question presented. Under the common law, if and when "the event happens which is to complete the transaction, the escrow holder becomes the agent in possession of the property or the holder of the title for the new owner." *Restatement (Second) Agency* §14D cmt. b, at 67. The escrow holder is under a mandatory duty to deliver the property to the new owner. *See* 28 *Am. Jur. 2d Escrow* §28, at 27-28 ("[U]pon the performance of the condition or the happening of the event stipulated in the escrow agreement, it is the duty of the depositary to deliver to the grantee or obligee the instrument deposited in the es-

crow. The depositary, being as much the agent of the grantor as of the grantee of a deed held by him or her, is as much bound to deliver the deed on the performance of the specified condition or the happening of the specified event as he or she is bound to withhold it until the performance or the happening of the event.") (internal footnotes omitted). "[A]fter performance of the condition, the grantee acquires title and is entitled to delivery of the instrument." 30A *C.J.S. Escrows* §23, at 639 (2007).

Thus, under the common law, when stock is placed in escrow by a seller, the purchaser's satisfaction of the conditions of the escrow means that "the escrow holder becomes the agent of the purchaser and the seller loses his or her property interest in the stock." 17 *Williston on Contracts* §51:45, at 738 (4th ed. 2000); *see id.* (noting that, unless the parties intend otherwise, "[t]itle to stock deposited in escrow" "pass[es]" once "the conditions in the agreement are performed").

Those principles are dispositive here. Under chapter 13, once a plan is confirmed, the bankruptcy court has resolved creditors' claims, and any other contingencies provided for by the plan have been satisfied, the conditions of the escrow are met. At that point, consistent with the principles discussed above, the debtor loses any remaining interest in the property; creditors become the "new owners" of the escrowed property; and the trustee becomes an agent of the creditors required to deliver that property to them. And while the court of appeals reached a contrary conclusion here, Pet. App. 17a, multiple bankruptcy courts, while not expressly invoking escrow analysis, have held that once a plan has been confirmed, creditors have a vested interest in payments to the chapter 13 trustee made un-

der the plan.[4] Common-law escrow principles explain why that is so, and conclusively refute petitioner's bare assertion that "a Chapter 13 creditor's interests do not vest until the monies are distributed." Pet. Br. 33 (internal alterations and quotation marks omitted).

2. Common-law trustee

It is also possible to conceive of the chapter 13 trustee as holding post-confirmation, pre-conversion payments in trust as a common-law trustee for the benefit of creditors.[5] Viewed that way, the result would be the

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[4] *In re Smith*, 511 B.R. 612, 620 (Bankr. W.D. Mo. 2014) ("the creditor's interest in Chapter 13 plan payments vest[s] when each payment is made and, upon conversion of the case to Chapter 7, any undistributed payments ... must be disbursed according to the terms of the confirmed plan"); *In re Pegues*, 266 B.R. 328, 334-336 (Bankr. D. Md. 2001) (following authority concluding that rights to payments made under the plan vest in the creditors); *In re Hardin*, 200 B.R. 312, 313-314 (Bankr. E.D. Ky. 1996) (§348(f) did not alter case law holding that "confirmation vests rights in the creditors" to plan payments); *In re Halpenny*, 125 B.R. 814, 816 (Bankr. D. Haw. 1991) ("when a debtor voluntarily pays funds to the Chapter 13 Trustee pursuant to the terms of a confirmed plan, the creditors have a vested right to receive the funds at the time the Trustee receives the funds"); *In re Galloway*, 134 B.R. 602, 603 (Bankr. W.D. Ky. 1991) ("creditors have a vested right to receive ... payments pursuant to the plan"); *In re Burns*, 90 B.R. 301, 304-305 (Bankr. S.D. Ohio 1988) ("when debtors have voluntarily paid funds to the Chapter 13 Trustee pursuant to the terms of a confirmed Plan, the creditors' right to receive funds pursuant to the confirmed plan vests *at the time the trustee receives the funds*"); *In re Redick*, 81 B.R. 881, 887 (Bankr. E.D. Mich. 1987) ("once the debtor has voluntarily parted with his wages and delivered them to the custody of the trustee in performance of a voluntary Chapter 13 plan ... the creditors have a vested right to receive those payments").

[5] Under the common law, escrow and trust bear similarities, the primary difference being the predominantly contractual nature of escrow. *See* 28 *Am. Jur. 2d Escrow* §1, at 6 ("An escrow agree-

same because a common-law trustee's wind-up authority upon termination includes the authority, indeed, the duty, to satisfy unpaid trust obligations, including payments that should have been paid out to beneficiaries before termination (such as the undistributed plan payments at issue here).

Read together, chapter 13 and the confirmed plan impose a duty on the trustee to hold post-confirmation, pre-conversion payments for the benefit of creditors and to distribute those amounts to creditors under the plan. *See* 11 U.S.C. §1326(a), (c); JA27 ("From the monthly payments described above, the Chapter 13 Trustee shall pay the following allowed claims in the manner and amounts specified."). Those statutory and contractual mandates could easily be viewed as creating a trust relationship, with the debtor as settlor and the chapter 13 trustee holding legal title for the benefit of creditors. *See Restatement (Second) Trusts* §2, at 6 (1959) ("[a] trust ... is a fiduciary relationship with respect to the property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another").

Indeed, many lower courts have held that a chapter 13 trustee has the duties of a common-law trustee to distribute the assets of the trust to creditors, as beneficiaries. For example, the bankruptcy court in *In re Waugh*, 82 B.R. 394, 398 (Bankr. W.D. Pa. 1988), explained that "11 U.S.C. § 1326 treats property received

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ment, while imposing a fiduciary relationship, and assuming some of the characteristics of a trust, is in essence a contractual undertaking to assure the carrying out of obligations already contracted for[.]"). In that respect, once a chapter 13 plan is confirmed, an escrow model provides the most applicable common-law analogy, though, as explained in the text, the result is the same if chapter 13 is viewed through the lens of the common law of trusts.

by the chapter 13 trustee pursuant to a confirmed chapter 13 plan as a trust for beneficiaries of the plan." *See also id.* at 400 (holding that §1326 "creates the condition of a trust"). Similarly, the court in *In re Rutenbeck*, 78 B.R. 912, 913 (Bankr. E.D. Wis. 1987), explained that "where a chapter 13 trustee is holding funds paid by the debtor in accordance with a confirmed plan, and the case is ... converted to another chapter, the undistributed funds ought to be treated as trust funds for the benefit of the creditors under the confirmed plan."

Under a common-law trustee model, creditors, not debtors, are entitled to post-confirmation, pre-conversion payments held by a chapter 13 trustee. "[W]hen [a] trust is terminated in any way," the trustee "has power to perform such acts as are necessary to the winding up of the trust and the distribution of the trust property as are expressly given or reasonably implied from the trust instrument." Bogert et al., *The Law of Trusts and Trustees* §1010, at 462-464 (updated 2014); *see* Uniform Trust Code §816(26) ("on termination of the trust," the trustee may "exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it"); *Restatement (Third) Trusts* §89, at 271 (2007) ("The powers of a trustee do not end on the trust's termination date but may be exercised as appropriate to the performance of the trustee's duties in winding up administration, including making distribution, in a manner consistent with the purposes of the trust and the interests of the beneficiaries.").

A trustee's wind-up powers include the authority—indeed, the "duty"—to "determine and satisfy trust obligations." *Restatement (Third) Trusts* §89 cmt. c, at 272. The concept of "obligations" is "comprehensive" and includes, for example, "unpaid 'income' owed to the

estate of a deceased life-income beneficiary." *Id.* reporter's notes, cmts. b&c, at 279. The distributions made by the trustee here were "obligations" of the trust: The trustee received funds while a binding contract was in effect requiring the payment of those funds to creditors. *See* JA27-31 (providing for mandatory payment of priority claims, secured claims, and unsecured claims; stating that monthly payments by petitioner "shall" be paid to creditors).

Such funds are directly analogous to unpaid income that should have been paid to a beneficiary during the life of a trust. *See, e.g., Restatement (Second) Trusts* §235A (income "received by the trustee or ... accrued prior to the death of the life beneficiary" is payable to the estate of life beneficiary, even where trust directs payment of principal to another upon life beneficiary's death); *In re Hansen's Trust*, 739 N.W.2d 170, 181 (Neb. 2007) ("the general common-law rule is that a beneficiary's estate may recover income of the trust, which is accrued and payable at the time of the beneficiary's death but has not been paid over, unless the trustee had uncontrolled discretion whether to make distributions of income"). Thus, viewing a chapter 13 trustee as holding undistributed post-confirmation, pre-conversion payments in trust as a common-law trustee for creditors compels the conclusion that the trustee must distribute those funds to creditors.

C. The Text, Structure, And Purposes Of The Bankruptcy Code Reinforce The View That Post-confirmation, Pre-conversion Plan Payments Belong To Creditors

For the reasons set forth above, this Court can resolve the question presented by interpreting the role of the chapter 13 trustee consistently with its common-law

antecedents. Additional considerations of statutory text, structure, and purpose, however, bolster the conclusion that post-confirmation, pre-conversion funds held by a chapter 13 trustee belong to creditors. *See Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012) (relying on considerations of "statutory structure" in interpreting Bankruptcy Code); *Ransom* v. *FIA Card Servs., N.A.*, 562 U.S. 61, 71 (2011) (relying on considerations of statutory "purpose" in interpreting Bankruptcy Code).

First, that conclusion best honors the basic bargain struck by chapter 13. A *quid pro quo* between debtors and creditors lies at the heart of chapter 13: "Chapter 13 debtors are permitted to keep their property, but they must agree to a court-approved plan under which they pay creditors out of their future income." *Hamilton*, 560 U.S. at 508. Indeed, debtors are expressly required, unless the creditors agree to different treatment, to pay *all* of their projected disposable income to creditors to remain in chapter 13. In exchange for those payments, a debtor is, among other things, "permitted to stave off foreclosure and cure [his] mortgage default, retain the use of his automobile, and enjoy the automatic stay." *In re Michael*, 699 F.3d 305, 319 (3d Cir. 2012) (Roth, J., dissenting); *see id.* at 320 n.7 (listing "varied" benefits a debtor receives under a chapter 13 plan).

To be sure, a debtor has the right to convert a case from chapter 13 to chapter 7, *see* 11 U.S.C. §1307(a), but conversion cannot alter retroactively the status of funds that a debtor has *already* paid to a trustee for disbursement to creditors. Those funds were paid at a time when the debtor enjoyed the benefits of chapter 13, and it would upset the bargain at the heart of chapter 13 to return those payments to the debtor simply because, for administrative or other reasons, they had not yet been distributed. *See, e.g.*, *In re Bell*,

248 B.R. 236, 239-240 (Bankr. W.D.N.Y. 2000) (conversion does "not retroactively revoke the intent [the debtor] had at the time when [he or she was] operating under a confirmed plan and voluntarily chose to make the required plan payments to enable [the debtor] to continue to enjoy the ongoing benefits of that plan"); *accord O'Quinn* v. *Brewer*, 143 B.R. 408, 413 (Bankr. S.D. Miss. 1992) (similar). This is not simply a "consideration[] of fairness," as the Fifth Circuit held (though it is that, too). Pet. App. 26. Rather, it is a powerful structural reason why creditors have the right to post-confirmation, pre-conversion funds.[6]

Indeed, the structure of the Code supports the conclusion that conversion does not operate retroactively in a related respect. Nothing in the Code expressly or impliedly gives the debtor a right to "claw back" plan payments that have already been disbursed to creditors before conversion, and petitioner has never argued otherwise. There is no reason for treating differently plan payments that have been made to a chapter 13 trustee but that, for administrative reasons, or simply due to the happenstance of the timing of payments, have yet to be disbursed to creditors. In either case, the debtor has voluntarily relinquished funds for the purpose of satisfying debts to creditors under the terms of a confirmed plan. And there is no reason to distinguish between

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[6] Petitioner insists that there is no such *quid pro quo* here because "by the time petitioner converted, the benefits offered by attempting to proceed in Chapter 13 had evaporated." Pet. Br. 45. But petitioner did receive the benefit of the opportunity to proceed under chapter 13; the price paid for that benefit included pre-conversion plan payments. One who invests in a business venture that ultimately fails cannot demand a return of the investment if the anticipated benefit of the venture "evaporates" (at least, absent some contractual provision to the contrary). The same is true here.

funds en route to creditors via a chapter 13 trustee and those that are already in creditors' hands.

Second, the conclusion that creditors have the right to post-confirmation, pre-conversion payments held by a chapter 13 trustee accords with Congress's decision to permit debtors to make plan payments directly to creditors, bypassing the role of the trustee as disbursing agent. Chapter 13 provides that a plan or confirmation order may opt out of the presumption that "the trustee shall make payments to creditors under the plan." 11 U.S.C. §1326(c). That statutory language thus "permits a debtor to act as disbursing agent" to creditors, subject to approval of a bankruptcy court. *Foster*, 670 F.2d at 486.

When a debtor is making plan payments directly to creditors, there can be no question that, once the debtor voluntarily relinquishes control of the funds, they become the creditors' property. Again, nothing in the Code suggests that debtors may "claw back" plan payments already in the hands of creditors. There is no sensible reason that creditors' entitlement to plan payments should turn on whether those payments are made to creditors directly or disbursed by the trustee. Either way, the legally significant moment is the point at which the debtor voluntarily surrenders property to make a plan payment.

Third, petitioner's rule—that post-confirmation, pre-conversion payments held by a trustee but not yet distributed belong to debtors—would require the anomalous result that creditors' ability to recover plan payments would turn on how expeditiously a trustee makes distributions to creditors and the particular distribution practices of the trustee. *See* Miller & Iskin, *Clarifying the Mysterious Chapter 13 Disbursement*

Process, 33 ABI J. 30, 98 (2014) ("the date of monthly disbursement may float between different trusteeships and some procedures may vary from office to office"). There is simply no logical reason to think that "[t]he speed by which the chapter 13 trustee makes distribution should ... determine the rights of creditors and debtors in the funds." *Waugh*, 82 B.R. at 400.

To the contrary, that result would create needless and substantial administrative hardships. As the Third Circuit recognized, the predictable creditor response to petitioner's rule would be to "request more frequent distributions from the Chapter 13 trustee," *Michael*, 699 F.3d at 316-317, including demands for daily distributions. But "daily distribution would create an administrative nightmare: trustee staff expenses would skyrocket and *de minimis pro rata* distributions to a multitude of creditors would result in huge bank processing expenses." *In re Redick*, 81 B.R. 881, 886 (Bankr. E.D. Mich. 1987); *cf. Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 588-589 (2008) (rejecting an "interpretation of [a] statute" that would raise questions of "practical feasibility"; explaining that "[i]t strains credulity that Congress" would replace a "workable" system with an administratively costly and burdensome framework).

Fourth, there are additional textual indications throughout chapter 13 that Congress contemplated that post-confirmation, pre-conversion payments belong to creditors, not debtors.

To start, Congress mandated that, "as soon as practicable after *completion by the debtor of all payments under the plan* ... the court shall grant the debtor a discharge of all debts." 11 U.S.C. §1328(a); *see also* JA27 ("the plan shall be deemed to have been completed when the Chapter 13 Trustee has received from or on

behalf of the Debtor(s) an amount" sufficient to satisfy the terms of the plan). The italicized language "clearly refers to payments made by the debtor to the trustee," 8 *Collier on Bankruptcy* ¶1328.02, not distributions from the trustee to creditors. Similarly, Congress provided that a plan may be modified any time "before the completion of payments under such plan." 11 U.S.C. §1329(a). Once again, that deadline refers to payments by the debtor to the trustee, not distributions by the trustee to creditors. *See* 8 *Collier on Bankruptcy* ¶1329.08 ("[t]he term 'payments under such plan' in this section has generally been held to mean payments made by the debtor, rather than payments made by the trustee to creditors").

Those statutory provisions demonstrate that it is the time at which the debtor pays the trustee that is legally significant. That is when the debtor's obligations are complete and when it makes sense to discharge a debt or to bar plan modifications. If Congress believed that a debtor retained an interest in funds paid to a trustee but not yet disbursed, it would have been more than a little strange to tie the time of discharge or the deadline for plan modification to the debtor's payment to the trustee rather than to the trustee's disbursement to creditors.

Finally, §1326(a)(2) reinforces the conclusion that post-confirmation, pre-conversion payments belong to creditors. As explained above, that section provides that, "[i]f a plan is not confirmed, the trustee *shall return* any such payments previously paid and not yet due and owing to creditors ... *to the debtor*." 11 U.S.C. §1326(a)(2) (emphasis added). That provision shows that Congress knows how to specify when and under what circumstances payments should be "return[ed]" to debtors. The absence of any similar "shall return" man-

date with respect to post-confirmation, pre-conversion payments upon conversion confirms that Congress did not intend or anticipate that result. *See Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal alterations and quotation marks omitted)).

II. Petitioner's Interpretation Of The Code Is Unconvincing

Petitioner's contrary arguments are insufficient to overcome the weight of the statutory analysis set forth above, which establishes that post-confirmation, pre-conversion plan payments held by a chapter 13 trustee but not yet distributed belong to creditors.

A. Petitioner's Statutory Arguments Are Wide Of The Mark

1. Section 348(f)

Petitioner's lead argument is based on §348(f), which provides that "when a case under chapter 13 of this title is converted to a case under another chapter under this title ... property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the [chapter 13] petition, that remains in the possession of or is under the control of the debtor on the date of conversion." 11 U.S.C. §348(f)(1)(A). According to petitioner, §348(f) "conclusively resolves the question presented" because it shows that "Congress intended that post-petition property of the estate in the Chapter 13 case should not be made available to creditors in the converted case." Pet.

Br. 27. In fact, §348(f) has no bearing on the question presented, for two reasons.

First, §348(f) speaks only to whether property acquired after a chapter 13 petition is filed should be included in the "estate" of a converted chapter 7 case. As petitioner's lengthy detour through the legislative history establishes (Pet. Br. 23-27), that was an important question before 1994 because courts had split on whether an asset acquired by a debtor after the commencement of a chapter 13 case (such as an inherited farm or a tort claim) should be included in the chapter 7 estate upon conversion and thus subject to liquidation. But §348(f) is beside the point here. No one is arguing that post-confirmation, pre-conversion payments in the hands of the trustee at the time of conversion are part of the *chapter 7 estate*. Accordingly, that §348(f) excludes postpetition property from "the post-conversion estate going forward under Chapter 7" (Pet. Br. 20) hardly "end[s]" "this case" (*id.* 21). The question here is whether post-confirmation, pre-conversion payments should be distributed to creditors as required by the chapter 13 plan or returned to the debtor, a question that §348(f) simply does not address.

The legislative history of §348(f), far from helping petitioner's case (Pet. Br. 23-27), confirms why §348(f) does not answer the question presented. As noted above, prior to 1994, courts had divided on whether property a debtor acquired after filing a chapter 13 petition would become property of the chapter 7 estate upon conversion. In *In re Lybrook*, 951 F.2d 136, 137-138 (7th Cir. 1991), the Seventh Circuit held that farm land inherited by a debtor after filing for chapter 13 should become part of the chapter 7 estate upon conversion. That case had nothing to do with undistributed plan payments made to a trustee under a confirmed

chapter 13 plan. The principal case on the other side of the divide was *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). There, the Third Circuit held that a debtor's tort action that accrued after the filing of a chapter 13 petition did not become part of the chapter 7 estate upon conversion. *Id.* at 803. Once again, that case had nothing to do with undistributed plan payments made to a trustee under a confirmed chapter 13 plan.

In enacting §348(f), Congress resolved this "split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7." H.R. Rep. No. 103-835, at 57 (1994). Congress was concerned that the Seventh Circuit's rule would "create a serious disincentive to chapter 13 filings" by holding open the prospect that assets acquired after the chapter 13 filing—and that thus would not have been liquidated had the debtor filed a chapter 7 petition to begin with—would be liquidated in the converted chapter 7 case. *Id.* It therefore amended the Code to "overrule[] the holding in cases such as [*Lybrook*]" and to "adopt[] the reasoning of [*Bobroff*]." *Id.* Congress's decision that postpetition inherited farm land (*Lybrook*) or postpetition tort actions (*Bobroff*) should not become part of the chapter 7 estate says nothing about the narrow question presented here—whether postconfirmation, pre-conversion plan payments held by a chapter 13 trustee but not yet administratively distributed belong to chapter 13 creditors or debtors.[7]

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[7] *Resendez* v. *Lindquist*, 691 F.2d 397 (8th Cir. 1982), adds nothing to petitioner's argument. Setting aside the lack of any evidence that Congress had this decision in mind in enacting §348(f), *Resendez* is irrelevant. *Resendez* assumed (because no party appears to have contested) that postpetition property became part of the chapter 7 estate. *Id.* at 398. The subsequent enactment of §348(f) rejected that assumption. *Resendez* went on to

For the same reason, §348(f)'s bad-faith exception does not assist the petitioner. *See* Pet. Br. 21-23. That provision makes clear that, if a debtor converts a case in bad faith, the default established by §348(f) is flipped and postpetition assets do become part of the chapter 7 estate. Petitioner's reliance on that exception is flawed for the same reason his reliance on the default rule set by §348(f) is flawed: This case is neither about the scope of the chapter 7 estate nor the treatment of postpetition wages generally, but rather about the proper distribution of payments a debtor voluntarily made to a chapter 13 trustee for purposes of distribution to creditors. Petitioner thus is wrong in arguing that the Fifth Circuit's decision "inexplicably treats sinners and saints alike" (Pet. Br. 22). If petitioner had converted in bad faith, all of his postpetition assets and earnings would be part of the chapter 7 estate. Distributing post-confirmation, pre-conversion funds held by the trustee to chapter 13 creditors—the only question presented here—thus does not treat petitioner as a "sinner" but only honors petitioner's contractual obligation to make monthly payments to the trustee for distribution to creditors.

Second, §348(f) is inapplicable here because the statute by its terms applies only to "property of the estate." But the funds at issue here—post-confirmation payments made to a trustee for the purpose of distribution to creditors—are not "property of the estate." Petitioner's contrary argument relies on the view that §1306(a) classifies his "earnings" as property of the es-

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address whether payments made to a chapter 13 trustee could be exempted in the chapter 7 case. It held that they could not be, relying on the debtor's voluntary decision to relinquish his interest in those funds. *Id.* at 399. Nothing in §348(f) addresses in any way that aspect of the *Resendez* holding.

tate. But once a portion of a debtor's "earnings" have been paid to a trustee pursuant to a confirmed plan, there is no basis for saying those funds remain the debtor's "earnings." *See Michael*, 699 F.3d at 319 ("[W]e are not dealing simply with wages here but with that portion of the wages that had been ... paid to the trustee for distribution to the creditors. I maintain that there is a crucial difference.") (Roth, J., dissenting). Certainly, as a matter of plain English or common sense, no one would say that money in the possession of a bank that could be traced to a mortgage payment made by a debtor from his earnings remain the debtor's "earnings" in the hands of the bank. *Cf. Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) ("In ordinary usage, to speak of a person's 'retirement funds' implies that the funds are currently in an account set aside for retirement, not that they were set aside for that purpose at some prior date by an entirely different person. Under petitioners' contrary logic, if an individual withdraws money from a traditional IRA and gives it to a friend who then deposits it into a checking account, that money should be forever deemed 'retirement funds' because it was originally set aside for retirement. That is plainly incorrect.").

The same is true here. After confirmation, a debtor's voluntary transfer of possession and control of plan payments to a chapter 13 trustee eliminates any basis for calling those funds a debtor's "earnings." They are instead funds that are to be paid to creditors under the confirmed plan. And because they are not "earnings," there is no basis for classifying the funds at issue here as property of the chapter 13 estate. Accordingly,

nothing in §348(f) suggests that such funds should be returned to the debtor upon conversion.[8]

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[8] The scope of the chapter 13 bankruptcy estate has been the focus of much debate and disagreement. One bankruptcy scholar observed in 2009 that "[t]hirty years into the life of the Bankruptcy Code, the courts still have no coherent theory of chapter 13." Carlson, *The Chapter 13 Estate and Its Discontents*, 17 Am. Bankr. Inst. L. Rev. 233 (2009). The difficulty arises from the apparent tension between two provisions of chapter 13—§1306 and §1327. Section 1306 states that "[p]roperty of the estate includes ... earnings from services performed by the debtor after commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first." 11 U.S.C. §1306(a). Section 1327(b), however, states that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all property of the estate in the debtor." *Id.* §1327(b). The analytic difficulty is reconciling the apparent inclusion in §1306(a) of post-confirmation earnings as property of the estate with §1327(b)'s directive that upon confirmation, all estate property vests in the debtor.

Courts have employed several different approaches to reconciling these provisions. Some have concluded that unless the plan provides otherwise, the estate terminates upon confirmation when all estate property vests in the debtor; some have concluded that the estate is preserved until the end of the case notwithstanding §1327(b)'s vesting provision; and some have attempted to craft intermediate approaches. *See, e.g.*, *In re Jones*, 420 B.R. 506, 512-516 (B.A.P. 9th Cir. 2009) (estate termination), *aff'd on other grounds* 657 F.3d 921 (9th Cir. 2011); *In re Heath*, 115 F.3d 521, 522-524 (7th Cir. 1997) (Posner, J.) (similar); *In re Fisher*, 198 B.R. 721, 733 (Bankr. N.D. Ill. 1996) (estate preservation); *Barbosa* v. *Solomon*, 235 F.3d 31, 35-37 (1st Cir. 2000) (intermediate approach). This question is fundamental to the structure of chapter 13 and the scope of the bankruptcy court's post-confirmation jurisdiction and authority. It is not presented here, because the plan provides that estate property does not revest in the debtor on confirmation. In resolving the question presented, however, the Court should take care not to pass inadvertently on this important issue that is likely to be presented in a future case.

2. Section 348(e)

In addition to §348(f), petitioner relies heavily on §348(e), which provides that "[c]onversion of a case ... terminates the service of any trustee ... that is serving in the case before such a conversion." 11 U.S.C. §348(e). Petitioner contends that §348(e) "incapacitates a Chapter 13 trustee from ... continuing to distribute a debtor's post-petition wages." Pet. Br. 27; *see* NACBA Br. 12-16. But §348(e) does no such thing.

Petitioner acknowledges that, upon conversion, a chapter 13 trustee must have the authority to perform "ancillary duties to clean-up and finalize the administration of the estate." Pet. Br. 29 (internal quotation marks omitted). For the reasons explained above, one of those administrative duties is the distribution of post-confirmation, pre-conversion payments to creditors. Under either an escrow-holder framework or a common-law trustee model, the chapter 13 trustee has the authority, and is obligated, to distribute those funds to creditors. *See* Part I.A, above.[9] In short, although petitioner (no fewer than seven times in his brief) faults lower courts for suggesting that §348(e) cannot be in-

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[9] Petitioner's argument (at 29) based on Bankruptcy Rule 1019(4) is difficult to comprehend. That rule provides that, "[a]fter qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11, 12, or 13 case shall, forthwith ... turn over to the chapter 7 trustee all records and property of the estate in the possession or control of the debtor in possession or trustee." In view of §348(f), that rule *cannot* mean that a chapter 13 trustee must turn over the entire chapter 13 estate to the chapter 7 trustee, as petitioner suggests. Instead, the rule can only be read to apply to "property of the estate" that belongs in the chapter 7 estate. So understood, the rule is silent as to what property should be included in the chapter 7 estate and it says nothing about what to do with undistributed post-confirmation, pre-conversion plan payments.

terpreted "too literally" (Br. 3, 13, 14, 18, 28), petitioner's own theory depends on the trustee retaining the authority after conversion to pay money to the rightful recipient.

Put differently, the parties agree that a chapter 13 trustee, although holding undistributed funds, may not keep those funds herself upon conversion. The parties also necessarily agree that a trustee retains the authority to distribute those funds to the person legally entitled to receive them. Under either petitioner's or respondent's reading, then, it is a significant overstatement to say that §348(e) "incapacitates" the trustee's authority to distribute post-confirmation, pre-conversion payments. *See* Pet. App. 10a ("Harris' argument is obviously not intended to be taken at face value; if the trustee has 'no authority to disburse funds,' she would be unable to return the funds to Harris as he requests"). The only question is: Who has the legal right to receive the funds held by the chapter 13 trustee, the debtor or creditors? And §348(e) sheds absolutely no light on *that* question.[10]

3. Section 1327(b)

Finally, petitioner argues that §1327(b) and the confirmation order had the effect of revesting "all property of the estate under Chapter 13 ... in petitioner when he

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[10] Petitioner's amici agree that the "trustee must hand over the funds to someone; she does not get to keep them for herself." NACBA Br. 15. But they argue that distributing funds to the debtor is "different in kind" from distributing funds to the creditors because the former "has no effect on the debtor's and creditor's respective substantive rights." *Id.* That argument assumes the answer it seeks to support. For the reasons set forth above in Part I.A, creditors *do* have a "substantive right[]" to post-confirmation, pre-conversion payments. Distributing those payments to debtors thus *does* affect the substantive rights of creditors.

converted his case to Chapter 7." Pet. Br. 31; *see* NACBA Br. 16-17. According to petitioner, this revesting "gives the debtor an unambiguous, vested interest in post-petition wages held by a Chapter 13 trustee at conversion." Pet. Br. 32. In fact, neither §1327(b) nor the confirmation order supports that conclusion.

As an initial matter, for the reasons described above, *see supra* pp. 35-37, the funds at issue are not property of the estate. The timing of any revesting of estate property is thus irrelevant.

In any event, §1327(b) simply establishes a statutory default with respect to revesting. It provides that "except as otherwise provided in the plan or the order confirming the plan," confirmation vests property of the estate in the debtor. 11 U.S.C. §1327(b). The purpose of this provision is to return to the debtor title to the property in the debtor's possession that, prior to confirmation, the debtor was holding for the benefit of the estate. By providing a default rule under which property revests in the debtor *except as provided in the plan or confirmation order*, the Bankruptcy Code necessarily contemplates that property dealt with in the plan will *not* revest in the debtor.

Section 1327 therefore has nothing to do with payments already remitted to the trustee, which are the express subject of the plan. As the Fifth Circuit correctly held, the plan here excludes funds in the hands of the trustee from revesting in the debtor by granting creditors an express contractual entitlement to payments made by the debtor on account of allowed claims. Pet. App. 20a. The plan could hardly be clearer on this point: "Allowed claims shall be paid to the holders thereof in accordance with the terms hereof. From the monthly payments described above, the Chapter 13

Trustee shall pay the following allowed claims in the manner and amounts specified." JA27; *see* JA28-31 (¶¶A-D). As discussed above, under the terms of the plan, the trustee in effect acted as an escrow agent, meaning that the creditors had a property interest in payments made by the debtor to which the plan entitled them. The plan thus expressly excluded such payments from revesting in the debtor. "'To the extent that the confirmed plan provides for payment from the debtor's future earnings and the debtor actually makes payment to the trustee pursuant to that plan, the debtor is not entitled to possession nor is the debtor vested with title to such payments. Sections 1306(b) and 1327(b) specifically except such payments from their provisions since the debtor's right of possession and vesting of title is limited to all sums and property not otherwise provided for in the confirmed plan or confirmation order.'" Pet. App. 20a.

Nothing in the confirmation order affects this analysis. The confirmation order states that "[s]uch property as may revest in the Debtor shall so revest only upon further Order of the Court or upon dismissal, conversion, or discharge." JA48. That language does not address the substantive rights of the debtor or his creditors upon conversion because it is silent regarding *what* property shall revest in the debtor upon conversion.

B. Petitioner's Purpose-Based Arguments Are Misplaced

Petitioner also argues that distributing post-confirmation, pre-conversion payments held by a trustee to creditors upon conversion would "[c]reate [p]erverse [i]ncentives," at odds with the purposes of the Bankruptcy Code. Pet. Br. 35. Petitioner is wrong.

First, petitioner insists that distributing post-confirmation, pre-conversion payments to creditors upon conversion would create a "clear disincentive to proceeding under Chapter 13 in the first place." Pet. Br. 38. That is incorrect. As explained above, Congress's reason for enacting §348(f) was that debtors might avoid chapter 13 if they were concerned that assets acquired after filing the petition, such as lottery winnings or an inherited farm, might become property of the chapter 7 estate upon conversion. The potential disincentive to attempt chapter 13 in that case is easy to see, as the Fifth Circuit recognized. *See* Pet. App. 23a-24a.

Here, by contrast, the question is whether money that a debtor has voluntarily remitted to a chapter 13 trustee under a confirmed plan (that the debtor himself proposed) for payment to creditors should, in fact, be paid to creditors upon conversion or, instead, returned to the debtor. The notion that this consideration would influence any debtor in choosing between chapters 13 and 7 is fanciful. Among other things, a debtor would have no way of knowing when filing a petition if a trustee would ever accumulate such funds. That circumstance arises essentially as a matter of happenstance. It would be impossible to predict at the time of filing. And a debtor would certainly have no way of knowing how long a trustee might hold accumulated funds or how much money the trustee would hold. The Fifth Circuit was thus correct, if not guilty of understatement, in concluding that "it is unlikely that a debtor would be meaningfully deterred" from pursuing chapter 13 "by the knowledge that payments made under a confirmed Chapter 13 plan will not be returned to him if he chooses to convert to Chapter 7." Pet. App. 24a; *see Michael*, 699 F.3d at 321 (Roth, J., dissenting)

("[M]y interpretation ... will not discourage voluntary debt repayment under Chapter 13. It merely requires debtors to honor their obligations to creditors as was agreed under a confirmed plan.").[11]

Beyond that, even if petitioner were correct that the possibility of recovering funds already in the hands of a chapter 13 trustee but not yet distributed would affect a debtor's choice between chapters 13 and 7, petitioner's rule would not affect that incentive. As explained above, the inevitable effect of petitioner's rule would be that chapter 13 trustees would make more frequent distributions to creditors. *See supra* pp. 29-30. Thus, even were petitioner to prevail, it would make no significant difference in the amount of funds available to a debtor upon conversion and thus would not affect the incentive to pursue chapter 13.

Second, petitioner argues that distributing post-confirmation, pre-conversion payments held by a trustee to creditors upon conversion "would create an anomaly" in light of §349's dismissal provision. Pet. Br. 39. Petitioner maintains that "[a] debtor who *dismisses* a Chapter 13 case is plainly entitled to any post-petition wages held by the Chapter 13 trustee" and that "[t]here is no logical reason for a different rule to govern conversions." *Id.* 39-40.

But because conversion is different from dismissal, treating them differently creates no anomaly. When a chapter 13 case is dismissed, the debtor does not receive a discharge. As a result, the creditors remain free to pursue state-law remedies for the recovery of

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[11] The fact that more than $4,000 accumulated in this case (Pet. Br. 38-39) does not help petitioner's argument because that is something that petitioner knows now only after the fact, not when a petition is filed.

their debts—which include their right to obtain a judgment and attach any funds that might have been returned to the debtor. *See, e.g., In re Williams*, 246 B.R. 591, 596-597 (B.A.P. 8th Cir. 1999) (per curiam) ("upon dismissal of the chapter 13 case, [a creditor] ha[s] the same rights and state law remedies with regard to the property as existed prior to the filing. Since no discharge was granted, [the creditor] may enforce these rights against the debtor personally"). Any money returned to debtors after dismissal would thus remain available to creditors outside bankruptcy.

Conversion operates differently. Creditors in a chapter 7 case have no entitlement to the debtor's postpetition assets. 11 U.S.C. §348(f). Assuming the debtor obtains a chapter 7 discharge, *id.* §727, assets outside the chapter 7 estate—including property acquired after the filing of the chapter 13 petition—could never be reached by prepetition creditors. Accordingly, it is petitioner's reading of chapter 13 that would create an anomaly between conversion and dismissal by depriving creditors in the former situation but not the latter of any ability to secure undistributed funds paid to and held by a chapter 13 trustee to satisfy prepetition debts.[12]

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[12] Petitioner also suggests that "a debtor who obtained undistributed funds from the trustee upon dismissal, and who met the eligibility requirements, could then file a new petition under Chapter 7" and then claim an exemption for those funds under §522(d). Pet. Br. 41. But petitioner's acknowledgment that a debtor must satisfy "eligibility requirements" is significant. Bad-faith gamesmanship disqualifies a debtor from converting a case from chapter 13 to chapter 7; such a debtor would "not qualify as a debtor" under 11 U.S.C. §109(e) as he is not a "member of the class of 'honest but unfortunate debtor[s]' that the bankruptcy laws were enacted to protect." *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 373 (2007) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991)). That

Third, petitioner maintains that debtors have a superior claim to post-confirmation, pre-conversion funds. *See* Pet. Br. 42-46. According to petitioner, this result flows from the principle that "creditors should ... be put back in precisely the same position as they would have been had the debtor never sought to repay his debts by filing under Chapter 13." *Id.* 43 (internal quotation marks omitted). But there is no such principle in chapter 13, as is evidenced by the fact that chapter 13 does not require creditors to return payments to debtors at the time of the conversion. There is no reason to treat undistributed payments held by a chapter 13 trustee differently. *See supra* pp. 28-29.

Petitioner separately argues that "[i]f petitioner's unsecured creditors had believed they were entitled to accumulating funds *during* the Chapter 13 proceedings, they could have moved to modify the plan to provide for their payment ahead of Chase." Pet. Br. 44. This argument misses the point: Because creditors had a right to plan payments held by the chapter 13 trustee, unsecured creditors did not "sle[ep] on their rights" (*id.*) by not seeking to modify the plan. Instead, they reasonably relied on the terms of the confirmed plan, which made clear that those payments belonged to creditors and would be distributed according to plan terms.[13]

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principle is sufficient to guard against the strategic behavior petitioner hypothesizes.

[13] Petitioner is also wrong that "the bulk of the creditors to which respondent distributed funds after conversion had no entitlement under the confirmed plan to receive those payments from the estate so early in the case." Pet. Br. 44. Part of the funds were paid to a secured creditor, plainly entitled to distribution under the plan. JA28-29 (¶C) ("secured creditors whose claims are allowed shall be paid ... a principal amount equal to the value of their collateral"). With respect to unsecured creditors, the plan

Finally, petitioner quibbles with the proposition that chapter 13 reflects a *quid pro quo* on the ground that "[c]reditors are virtually always better off if a debtor first attempts to proceed under Chapter 13 and then converts than they are if the debtor files immediately under Chapter 7." Pet. Br. 46. This is wide of the mark. To be sure, chapter 13 is intended to be advantageous for debtors and creditors alike. But it remains the case that a confirmed chapter 13 plan embodies a bargain between debtors and creditors in which the debtor makes payments to creditors in return for certain benefits, and that creditors obtain a property interest in those payments once made.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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provides that "[p]ayments to general unsecured creditors shall be made on a pro rata basis as funds become available after secured and priority claims have been paid in full." JA29-31 (¶D). The effect of that provision is to give unsecured creditors the right to any funds not necessary to satisfy the claims of secured creditors.

Respectfully submitted,

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REPLY BRIEF

No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

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3 *Collier on Bankruptcy* (16th ed., Alan N. Resnick & Henry J. Sommer eds., 2012) 21

Black's Law Dict. (10th ed. 2014) 15

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Mary F. Radford, George G. Bogert, & George T. Bogert, *The Law of Trusts & Trustees* (3d ed. 2006) 12–13

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REPLY BRIEF FOR THE PETITIONER

Contrary to respondent's suggestion, the Bankruptcy Code answers the question presented. Congress expressly and unambiguously authorized Chapter 13 debtors to convert to Chapter 7 "at any time." 11 U.S.C. § 1307(a). When a debtor makes that conversion, it takes effect immediately and ends the Chapter 13 proceeding. *Id.*; see also 11 U.S.C. § 103(i). Any confirmed plan is then no longer "bind[ing]," and the Chapter 13 trustee cannot "make payments to creditors under the plan." 11 U.S.C. §§ 1327(a), 1326(c). The trustee's service terminates, post-petition earnings cease to be property of the estate (unless the conversion was in bad faith), and those funds belong to the debtor. 11 U.S.C. §§ 348(e)–(f), 1327(b). All of this flows directly from the Code.

As respondent would have it (Resp. Br. ("Br.") 1), however, these statutory directives have no bearing on what a trustee does with post-petition funds she is holding when a conversion to Chapter 7 takes place following plan confirmation. But respondent's attempt to avoid the statute rests on a startling and erroneous premise: After a Chapter 13 plan is confirmed, she argues, those funds are "not 'property of the estate'" at all. Br. 35, 40. Rather, she (now) says, these funds "belong to creditors." *Id.* at 15, 19, 26–27, 30–32, 35, 45. Respondent thus fashions herself *not* as a bankruptcy trustee, but rather as an "escrow agent" or "common-law trustee" who serves as a mere "conduit" of funds to which creditors have obtained property rights. *Id.* at 15–26.

That reimagining of Chapter 13 finds no footing in the Bankruptcy Code. Respondent hardly contends otherwise, and instead resorts to viewing Chapter 13's "overarching structure" through her preferred "lens" of escrow and common-law trust. Br. 1, 13, 24 n.5. But the statutes contradict that theory. At least half a dozen times, the Bankruptcy Code specifies that funds held by a Chapter 13 trustee *are* "property of the estate"—*not* property of creditors. See pp. 6–7, *infra*. And as recently as her brief in opposition, respondent acknowledged as much. See Opp. 9 ("[F]unds voluntarily paid by the Debtor (even from wages) * * * *belong to the Chapter 13 estate*.") (emphasis added).

Respondent fares no better in observing that a confirmed Chapter 13 plan is "binding" and that a Chapter 13 trustee has authority to "make payments to creditors under the plan." Br. 16–18, 29 (discussing 11 U.S.C. §§ 1326(a), (c), 1327(a)). Through the very act of conversion, a Chapter 13 plan is nullified and the trustee who administers it dismissed. Those statutes thereby cease to apply, and they do not establish that funds "belong to creditors" beforehand. Even the Fifth Circuit soundly rejected respondent's theory, recognizing that there is "no support for [respondent's] rule in the Bankruptcy Code or in any legislative history." Pet. App. 18a. On this the circuits are in agreement.[1]

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[1] See *In re Michael*, 699 F.3d 305, 312–313 (3d Cir. 2012) ("No provision in the Bankruptcy Code classifies any property, including post-petition wages, as belonging to creditors."); *Arkison* v. *Plata (In re Plata)*, 958 F.2d 918, 922 (9th Cir. 1992) ("A Chapter 13 creditor's interests do not vest until the monies

Stripped of the false premise that undisbursed funds "belong to creditors," respondent's attempt to evade the statutory text comes up well short. Section 348(f) directs that the post-petition earnings at issue here remain "property of the estate in the converted case" only upon a bad-faith conversion. Section 348(e) "terminates" the Chapter 13 trustee's "service" as the estate's representative and disbursing agent. And Section 1327(b) vests the former property of the estate in the debtor.

Not surprisingly and in any event, respondent's extra-textual approach to the question presented results in an unworkable rule unintended by Congress. Almost in passing, respondent notes that the purported escrow account for creditors is established only "following" the resolution of "contingencies in the plan regarding creditors' rights to payment." Br. 13. Fully stated, respondent's proposed rule is that "once [1] a plan is confirmed, [2] the bankruptcy court has resolved creditors' claims, and [3] any other contingencies provided for by the plan have been satisfied, the conditions of the escrow are met." *Id.* at 22. Those *post*-confirmation "conditions" are significant, and they demonstrate that "confirmation of a plan" is not the "sharp divide" respondent claims. *Id.* at 5. This case is a prime example: The "contingencies provided for by [petitioner's] plan" for the payment of unsecured creditors had not been "satisfied" when petitioner

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are distributed."); *Resendez* v. *Lindquist*, 691 F.2d 397, 398 (8th Cir. 1982) (referring to plan payments as "property of the estate in the possession of the Chapter 13 trustee").

converted to Chapter 7. *Id.* at 22. Thus petitioner would win *even under respondent's rule.*

Finally, respondent's approach is contrary to congressional goals underlying Chapter 13, Chapter 7, and the debtor's right to choose whether and when to convert between them. It is clear—not "fanciful" (Br. 42)—that continuing payments to creditors out of debtors' post-petition earnings following conversion would deter debtors from choosing or continuing to proceed under Chapter 13. See Pet. Br. 23–26. Respondent also readily admits (at 43–44) that her reading would treat undisbursed funds differently in a case that ends in conversion than in one that ends in dismissal. She does not explain why her preferred escrow and trust analogies are effective in the former but not the latter. And respondent is wrong that the funds at issue are a "*quid pro quo*" (Br. 46) that the Chapter 13 debtor irrevocably commits to his Chapter 13 creditors for the privilege of trying to repay them *as much or more* than they would receive in a Chapter 7 case. Returning any undisbursed plan payments to the debtor who converts his case out of Chapter 13 in good faith is the natural and intended effect of Congress's decision to let debtors make such a conversion "at any time." 11 U.S.C. § 1307(a).

I. Chapter 13 Plan Payments Are Property Of The Estate And Do Not "Belong" To Creditors Before They Are Distributed

Respondent's entire argument depends on a demonstrably false premise: that a debtor's post-confirmation payments to a Chapter 13 trustee are not property of the estate, but instead belong to

creditors. In this view, a Chapter 13 trustee holds property *of the creditors* "effectively" in an escrow account or common-law trust. *E.g.*, Br. 15. That conception of Chapter 13 is unmoored from the Bankruptcy Code.

A. Plan Payments To Chapter 13 Trustees Are "Property Of The Estate"

Respondent's argument that trustees have the authority to make post-conversion distributions to creditors flows from her assertion that "the funds at issue here—post-confirmation payments made to a trustee for the purpose of distribution to creditors—are *not* 'property of the estate.'" Br. 35; see also *id.* at 40. Those funds, respondent says, "belong to creditors," *id.* at 15, 26–27, 30–32, who "obtain a property interest in those payments once made" to the trustee, *id.* at 46. That is a new argument, and it is wrong.

For starters, respondent's brief in opposition in this Court, and both of her briefs in the court of appeals, acknowledged that "funds voluntarily paid by the Debtor (even from wages) * * * *belong to the Chapter 13 estate*." Opp. 9 (emphasis added); Resp. C.A. Br. 23 (same); Resp. C.A. Reply Br. 4 (same); accord Resp. C.A. Reply Br. 3 ("In this case, Debtor's wages were part of the bankruptcy estate up until conversion."); *id.* at 7 ("In the case at bar, Debtor's wages were (and still are) part of the estate up until conversion."). Respondent's new argument is waived. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 212 n.2 (2004) (citing S. Ct. R. 15.2).

As for the merits of respondent's new position, she had it right the first, second, and third time. The

Bankruptcy Code says, repeatedly, that a Chapter 13 trustee holds "property of the estate." For example:

- Under Chapter 13, "earnings from services performed by the debtor after commencement of the case" are "[p]roperty *of the estate*." 11 U.S.C. § 1306(a)(1) (emphasis added). There is no exception for such earnings that are placed in the Chapter 13 trustee's possession. By contrast, either a debtor or a trustee can have "possession of the property *of the estate*" depending on the terms of "a confirmed plan or order confirming a plan." 11 U.S.C. § 1306(b) (emphasis added).
- Creditors in a Chapter 13 case make claims *against the estate*. See 11 U.S.C. § 502(e)(1)(A) (referring to a "creditor's claim against the estate"); 11 U.S.C. § 502(j) (referring to "payment or transfer from the estate" to "a holder of an allowed claim"). In respondent's view, a creditor's claim is against "escrowed" funds.
- Chapter 13 trustees are the "representative *of the estate*." 11 U.S.C. § 323(a) (emphasis added). Respondent would make them the representative *of the creditors*.
- Chapter 13 trustees are authorized to "make [a] deposit or investment of the money *of the estate* for which [the] trustee serves," subject to statutory safeguards. 11 U.S.C. § 345 (emphasis added); see also J.A. 46. Under respondent's theory, Chapter 13 trustees lack authority to deposit post-confirmation payments into a bank account (or their authority to do so emanates from some other source, unconstrained by Section 345's explicit safeguards).

- Chapter 13 trustees must make a final report and account that covers their "administration *of the estate*." 11 U.S.C. § 704(a)(9), *incorporated by* 11 U.S.C. § 1302(b)(1) (emphasis added); see Ch. 13 Standing Trustee's Final Rpt. & Account, *In re Harris*, No. 10-50655, Doc. 36 (Bankr. W.D. Tex. Dec. 6, 2011) (accounting for respondent's "administration of the estate" by detailing the receipt and disbursement of post-confirmation plan payments).
- Chapter 13 trustees shall dispose of "any remaining property *of the estate*" ninety days "after the final distribution under section * * * 1326." 11 U.S.C. § 347(a) (emphasis added); see also J.A. 48. In respondent's world, however, once a plan is confirmed there *is* no "remaining property of the estate" in the trustee's possession.[2]

Those statutes squarely contradict respondent's novel theory. Perhaps that explains why the

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[2] Respondent notes (Br. 37 n.8) that courts have taken different approaches to how plans and confirmation orders go about designating that property remains in the estate after confirmation, rather than vesting in the debtor under the default rule in Section 1327(b). Most courts have held that whenever a confirmed plan provides for payments to a trustee it "otherwise provide[s]" for those funds to remain property of the estate. 11 U.S.C. § 1327(b). A minority has held that such a provision does not, without more, trump Section 1327(b)'s debtor-vesting default rule, meaning that such payments are property of the debtor upon confirmation. But that is not an issue here; the confirmation order provided for *all* property of the estate to *remain* property of the estate *until conversion*. J.A. 48. In any event, *no* approach to Section 1327(b) characterizes plan payments as property *of the creditors*.

National Association of Chapter 13 Trustees (NACTT), as *amicus curiae*, stops short of endorsing respondent's position that plan payments "belong" to creditors and are not "property of the estate." See NACTT Br. 15 (arguing that the Fifth Circuit correctly held that "creditors need not hold 'vested rights' to funds in order to have claims to the funds that are superior to the debtor's"); see also *id.* at 2 ("A chapter 13 trustee * * * is empowered to * * * collect property of the estate.").

Not surprisingly, moreover, respondent provides no meaningful authority for her supposedly "common sense" and "plain English" belief that earnings made "property of the estate" by Section 1306(a)(2) lose that character once transferred to a Chapter 13 trustee under a confirmed plan. For that remarkable proposition, respondent relies entirely (at 36) on the dissenting opinion in *In re Michael* (which itself acknowledged that Chapter 13 "creditors receive money paid into the Chapter 13 estate," 699 F.3d at 320), and an inapposite analogy to *Clark* v. *Rameker*, 134 S. Ct. 2242 (2014).[3] It would work a massive change to bankruptcy law if property of the estate ceased to belong to the estate simply because a bankruptcy trustee had taken possession of it under a confirmed plan.

Respondent also contends that *undistributed* plan payments must "belong" to creditors because

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[3] Like AFSA's milk-and-bread analogy (AFSA Br. 20–21), respondent's analogy to *Clark* assumes the answer it seeks by treating a Chapter 13 trustee as a mere conduit for funds that "belong to creditors," rather than as a bankruptcy trustee who possesses property of the estate.

petitioner does not claim to be able to recapture lawfully *distributed* funds. See Br. 28–29. But respondent cites no authority for the notion that conversion must render the Chapter 13 proceedings void *ab initio* to be effective as to undistributed property. To the contrary, once a Chapter 13 trustee has lawfully distributed property of the estate to creditors who hold allowed claims, those funds are no longer property of the estate and the bankruptcy court's jurisdiction over those funds ends. That does not mean, however, that creditors have property rights over funds not distributed to them that remain in the estate.

Finally, *amici* suggest that plan payments from post-petition earnings are not property of the estate because Section 1322(b)(8) allows creditors to be paid out of either property of the estate or property of the debtor. NACTT Br. 7. That option (which facilitates direct debtor disbursements) does not affect how the Code defines which is which, however, and nothing in Section 1322(b)(8) suggests that payments to creditors come out of escrowed "property of the creditors."

B. Sections 1326 And 1327(a) Do Not Authorize Chapter 13 Disbursements After Conversion To Chapter 7

Respondent and her *amici* cite two Code provisions purportedly showing that plan payments in the possession of the trustee "belong" to creditors, not to the estate: (1) Section 1327(a), which makes confirmed plans "binding," and (2) Section 1326, which authorizes trustees to make payments to creditors under the plan. Br. 17–18, 20, 24.

According to respondent, those provisions make the Chapter 13 trustee "an agent who is bound to carry out the terms and conditions of a contract between the debtor and his creditors." *Id.* at 19.

But that argument has a critical flaw: Sections 1326 and 1327(a) *cease to apply* when a debtor converts his case to Chapter 7. Section 103(i) of the Bankruptcy Code provides that "Chapter 13 of [Title 11]" (*i.e.*, 11 U.S.C. §§ 1301–1330) "applies only in a case *under such chapter*." 11 U.S.C. § 103(i) (emphasis added). When petitioner converted his case to Chapter 7, it immediately became a case "under" Chapter 7 to which the relevant portion of *that* chapter (*i.e.*, 11 U.S.C. §§ 701–728) applied. See 11 U.S.C. § 103(b).

Indeed, the principal consequence of conversion is to immediately terminate the Chapter 13 proceeding. "It is well settled," the court of appeals acknowledged, "that upon conversion to Chapter 7, 'the chapter 13 plan and the order confirming that plan are no longer in force.'" Pet. App. 18a (quoting *In re Doyle*, 11 B.R. 110, 111 (Bankr. E.D. Pa. 1981)); see also *In re Michael*, 699 F.3d at 313. Thus, the confirmed plan is no longer "bind[ing]" (§ 1327(a)), and the trustee no longer has any statutory authority to "make payments to creditors under the plan" (§ 1326(c)).[4]

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[4] Respondent's *amici* argue that Section 1326(a)(2)'s final sentence applies to *post*-confirmation plan payments, not just to the *pre*-confirmation payments referred to in the paragraph's preceding sentence (and then referenced by the final sentence's phrase "such payments"). NACTT Br. 8–11; AFSA Br. 8–12. That is mistaken, as the court of appeals held below. See Pet.

Respondent's argument appears to be that because Sections 1326 and 1327 *did* apply when the debtor made his plan payments, they somehow *continue* to govern what the trustee does with those funds after conversion. See Br. 17–18. Not so. That is antithetical to the very notion of conversion. Plan provisions that *had* governed a trustee's disbursements to creditors do not continue to apply in the converted case any more than do plan provisions that *had* governed the debtor's obligation to make payments to the trustee. Respondent would effectively graft onto Section 103(i) new language to make Chapter 13 applicable not only to cases proceeding "under such chapter," but also to cases converted to another chapter until funds held by the former trustee in the former chapter have been disbursed. That is not the statute that Congress wrote or intended.

Respondent also has it exactly backward when arguing (at 17, 29) that Chapter 13 debtors' ability to pay creditors directly supports her theory. Instead, it further demonstrates that property rights shift to creditors only upon *disbursement*. Petitioner's confirmed plan, for example, required him to "direct pay" his future mortgage payments to Chase (as opposed to payments on his arrears, which the trustee would make). J.A. 34. Until petitioner *made* such payments, the funds did not "belong" to Chase.

App. 14a–18a. Section 1326(c) is what authorizes trustees to distribute post-confirmation plan payments to creditors "under the plan." In any event, whether Section 1326(a) or (c) applied to the funds at issue *during* the Chapter 13 proceeding, *neither* of them applied after conversion to Chapter 7.

There is no reason for a different rule when the trustee, instead of the debtor, is the plan's disbursing agent.

Respondent cites Sections 1328(a) and 1329(a) as evidence that "it is the time at which the debtor pays the trustee that is legally significant." Br. 31. Yet respondent ignores Section 348(f)(1)(C), which makes clear that it is the "date" and "time of conversion" that is the "legally significant" event insofar as ending payments to creditors in the Chapter 13 case. See NACBA Br. 21–22. This provision fixes the status of certain creditors in a converted case based on whether they had been "paid in full" or "fully cured" as of the "date" or "time of conversion." Respondent, however, would have it that disbursements to creditors in Chapter 13 continue *after* that "date" and "time," leading to anomalous results unintended by Congress.

In short, respondent's analogy from Chapter 13 to the common law of escrow and trust falls flat. A salient feature of escrow is its irrevocability. There is no "deposit in escrow" where "the depositor reserves a power of revocation." *Restatement (Second) of Trusts* § 32 cmt. d (1959). But Congress made Chapter 13 plans *revocable* by the debtor—granting him an absolute right to convert to a Chapter 7 proceeding "at any time." 11 U.S.C. § 1307(a); see also NACTT Br. 5 ("The debtor has the power to terminate a plan at virtually any time."). Likewise, under the law of trusts, the apt analogy (if any) is to the *revocable* trust settlor's right to obtain trust property upon exercising his right to revoke. See generally Mary F. Radford, George G. Bogert, & George T. Bogert, *The Law of Trusts and Trustees*

§ 1000 (3d ed. 2006); *Restatement (Third) of Trusts* § 63 (2003).

II. The Bankruptcy Code Requires That Chapter 13 Trustees Return Undistributed Post-Petition Earnings To The Debtor Upon Conversion

Respondent is wrong to say that "[n]o provision of the Bankruptcy Code answers" the question presented. Br. 1. Congress has authorized debtors to convert from Chapter 13 to Chapter 7 "at any time," 11 U.S.C. § 1307(a), and prescribed effects of such a conversion that resolve this case. Replacing those statutes with respondent's "escrow" regime of contingent creditor property rights would violate those statutory directives and, in any event, prove unworkable.

A. Respondent Cannot Evade The Statutory Effects Of Conversion

1. *Section 348(f).* Respondent contends that Section 348(f) "has no bearing on the question presented." Br. 33. To support that view, respondent rehashes the theory that post-petition earnings paid to a Chapter 13 trustee after plan confirmation "belong to creditors." Br. 35–36.

As we have explained, however, respondent's property-rights argument lacks any basis in the Bankruptcy Code. See pp. 4–12, *supra*. Plan payments held by the Chapter 13 trustee *are* "property of the estate * * * on the date of conversion." 11 U.S.C. § 348(f)(1)(A). If a conversion to Chapter 7 is made in bad faith, those funds become "property of the estate in the converted case"

under the unambiguous terms of Section 348(f)(2). In those circumstances, the Chapter 13 trustee is obligated to turn over those funds to the Chapter 7 trustee for administration and potential disbursement to creditors. Fed. R. Bankr. P. 1019(4). If the conversion is made in good faith, by contrast, post-petition earnings that are among the "property of the estate on the date of conversion" do not become "property of the estate in the converted case." 11 U.S.C. § 348(f)(1)(A).

The message to debtors is clear: Convert in good faith and post-petition earnings held in the estate are yours; convert in bad faith and those funds remain in the estate and available to your creditors. There is no basis to suppose that Congress intended post-petition earnings saved from the statute's bad-faith-conversion penalty to be disbursed to creditors all the same by a terminated Chapter 13 trustee. For the same reason, it is unpersuasive to argue, as respondent does (at 33), that Section 348(f) "simply does not address" what happens to "post-confirmation, pre-conversion payments" after a good-faith conversion.[5]

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[5] Respondent is wrong (Br. 33–34) that Congress's intent was limited to addressing the facts of two cases specifically cited in a House report. The stated legislative intent was to correct an error made in cases "such as" those, see Pet. Br. 23–26, one of which expressly relied on cases adopting respondent's approach to post-petition plan payments, see *In re Lybrook*, 951 F.3d 136, 138–139 (7th Cir. 1991) (discussing *Resendez*, 691 F.2d at 398–399). In any event, the text of Section 348(f) contains no exception for post-petition earnings held by the Chapter 13 trustee.

2. *Section 348(e).* By its terms, this provision prohibits the trustee from, as respondent contends, conducting business as usual: "Conversion * * * terminates the service of any trustee * * * serving in the case before such conversion." 11 U.S.C. § 348(e). In respondent's view, that "sheds absolutely no light" on whether Chapter 13 trustees should keep disbursing money to creditors after conversion of a case (and according to the terms of an inoperable Chapter 13 plan). Br. 39. That is implausible.

Respondent's "service," as she explains it, is that of a "disbursing agent of * * * payments to creditors." Br. 18; see also *id.* at 19 ("[A] trustee serves as a disbursing agent with respect to plan payments."). Petitioner disputes that funds the trustee disburses "belong" to creditors before they are disbursed, but not that the trustee acts as a disbursing agent. See Pet. Br. 27. That *is* the "service" that "terminates" upon conversion. See, *e.g.*, *Black's Law Dict.* 1576 (10th ed. 2014) (defining "service" as "[t]he official work or duty that one is required to perform"). As the bankruptcy court put it, "the trustee can no longer be functioning as the trustee, and, therefore can no longer be functioning as the disbursing agent." Pet. Br. 10 (citation omitted). That does not take the statute "too literally" (Pet. App. 10a (quoting *In re Parrish*, 275 B.R. 424, 430 (Bankr. D.D.C. 2002)); it affords the statute its plain meaning.

It is no answer, as respondent contends, that the trustee cannot "keep" undistributed funds after conversion and has to give them to someone. Br. 39. Section 348(e) is not silent on who that "someone" is—or at least on who it is *not*. The effect of Section 348(e) is to remove the Chapter 13 trustee as the

"representative of the estate" (11 U.S.C. § 323(a)) against which creditors assert their claims. It terminates the Chapter 13 trustee's authority and obligation to continue disbursing property to those creditors. At that point, any "property of the estate" must be turned over to the new Chapter 7 trustee, who takes over and becomes responsible for any future disbursements to creditors. Fed. R. Bankr. P. 1019(4). A Chapter 13 trustee cannot continue her "service" as a disbursing agent merely by recasting it as a post-conversion "administrative duty." The specific delineation by statute and rule of the trustee's limited administrative duties after conversion (see Br. 38) counsels *against* understanding Congress to have also conveyed this additional—and substantial—power on the "terminate[d]" trustee.

3. *Section 1327(b).* Respondent fails to square her view with the fact that confirmation "vests all of the property of the estate in the debtor" "[e]xcept as otherwise provided in the plan or in the order confirming the plan." 11 U.S.C. § 1327(b). Respondent proceeds, once again, from the flawed premise that petitioner's wages were "not property of the estate" and had already vested *in creditors*. Br. 40–41. But see pp. 4–12, *supra*. Likewise, respondent contends (as did the court of appeals) that when the plan and order provided for payments to the trustee, it made it so that such funds *never* vested in the debtor under Section 1327(b). Contra *In re Michael*, 699 F.3d at 313; *Nash* v. *Kester (In re Nash)*, 765 F.2d 1410, 1414 (9th Cir. 1985). But there is no reason to read a provision dealing with *possession* of property of the estate as governing whether such property can vest in the debtor at conversion.

A debtor's confirmed plan and confirmation order cease to be effective at conversion. So, too, do any exceptions they contain to vesting property of the estate in the debtor under Section 1327(b). That is exactly how the plan and order worked in petitioner's case. The "order confirming the plan" (11 U.S.C. § 1327(b)) stated that "[s]uch property as may revest in the Debtor shall so revest only upon further Order of the Court or upon dismissal, *conversion*, or discharge" (J.A. 48 (emphasis added)). Under Section 1327(b) and that order, debtor's post-petition earnings vested in him when he converted his case to Chapter 7.

B. Respondent's Approach Impractically Depends On The Trustee's Resolution Of Post-Confirmation "Contingencies" And "Conditions"

Respondent's proposed rule is that "once [1] a plan is confirmed, [2] the bankruptcy court has resolved creditors' claims, and [3] any other contingencies provided for by the plan have been satisfied, the conditions of the escrow are met." Br. 22. Those second and third conditions are significant, and they prove respondent's view to be unworkable.

First, as those conditions demonstrate, respondent's approach does not make plan confirmation an on/off switch for creditors' purported property rights to undisbursed funds. As respondent acknowledges, Chapter 13 trustees can make payments only to creditors "holding *allowed* claims." Br. 7 (emphasis added); see also J.A. 27, 47. The claims-allowance process can be lengthy, however, and it often continues well after the bankruptcy

court has confirmed a plan. Br. 7.; see also Fed. R. Bankr. P. 3002(c) (providing most creditors 90 days from the initial meeting of creditors to file proofs of claims). Respondent admits that, under her approach, a trustee would still "be required to await the conclusion of that process to determine the amount each creditor is entitled to receive under the plan." Br. 7. There is no support in the Code for having *property rights* turn on the vagaries of that process.

What is more, the twists and turns of claims allowance would render respondent's rule unwieldy in practice. To take just a few examples: Do creditors obtain property rights to undisbursed funds when their proofs of claims are filed (and "deemed allowed," 11 U.S.C. § 502(a)), then lose them when an objection is filed (see *ibid.*), only then to regain those rights if the objection is denied? Do undisbursed funds "belong" to a creditor who by happenstance filed a proof of claim moments before the debtor's notice of conversion because that claim is momentarily "deemed allowed" even though no one—including the trustee—had a chance to object? What about the creditor whose proof of claim was subject to a frivolous objection pending at the time of conversion—is he out of luck? In a significant understatement, the NACTT points out (at 33) that "[t]he Fifth Circuit * * * did not provide clear guidance for determining the details of the creditors' 'superior' claim to the undistributed funds." Neither does respondent.

Indeed, this case shows why the "contingencies" built into respondent's rule are fatal to her position. Petitioner's confirmed plan provided for the payment

of unsecured claims only "as funds become available after secured and priority claims have been paid in full." J.A. 30. When petitioner converted his case, however, his secured creditors had *not* been "paid in full." Chase had received relief from the automatic stay, but that did not resolve its claim or amount to its payment "in full." See NACTT Br. 27 n.9. Even under respondent's proposed rule, therefore, the "contingencies in the plan regarding [unsecured] creditors' rights to payment" had not been satisfied when petitioner converted his case to Chapter 7.[6]

III. Post-Conversion Distributions Penalize Debtors, And Respondent's Contrary Policy Rationale Is Misguided

Respondent's post-conversion distribution penalized petitioner for not having converted to Chapter 7 as soon as Chase obtained relief from the stay. That penalty was unsupported by the Code and undermined Congress's intent in giving the debtor control over when to make a good-faith conversion. No "bargain" petitioner had with his creditors demands a different result.

1. Respondent finds it "fanciful" that her rule might "influence" debtors against electing to make

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[6] Nine days *after* petitioner converted to Chapter 7, respondent filed a recommendation to "treat[]" Chase's $5,574.53 claim as "allowed" in the exact amount Chase had already been paid ($1076.79). See Trustee's Recommendations Concerning Claims, *In re Harris*, No. 10-50655, Doc. 34 (Bankr. W.D. Tex. Nov. 30, 2011), at 1–2. But cf. 11 U.S.C. § 348(e). Having thus rendered Chase's claim "paid in full" *post*-conversion, respondent disbursed funds to unsecured creditors the next day.

their future income "property of the estate" under Chapter 13 instead of protecting it under Chapter 7. Br. 42. It is not. Debtors generally elect to proceed under Chapter 13 only if they believe that, by devoting future income to the estate, they will be able to obtain a discharge of their debts without liquidating assets. That goal proves elusive in a majority of cases, however, so debtors' right to withdraw future income from the estate "at any time" by converting to Chapter 7 is an important inducement to attempt Chapter 13 in the first place.

What is more, respondent ignores that her rule would adversely "influence" whether debtors *maintain* their Chapter 13 case when the going gets tough. Here, for example, petitioner stuck with Chapter 13 for a year after Chase obtained relief from the stay. Pet. App. 4a. As respondent explains, debtors in those circumstances "commonly reach agreements with their mortgage servicers to modify their mortgage loans," and then obtain corresponding "plan modification[s]." Br. 10; see also NACTT Br. 27 n.9. It is in all parties' interest to encourage such efforts. See Br. 46. If a debtor knows that the plan payments he makes while trying to salvage his Chapter 13 proceeding will be lost if he fails, he will have good reason not to take the risk. There is no dispute in this case that if petitioner had converted his case immediately when Chase obtained relief from the stay, the $4,319 at issue would be his today.

2. Respondent tacitly concedes (at 43–44) that her proposed rule would have Chapter 13 trustees treat undistributed funds "differently" upon conversion than upon dismissal. But cf. Opp. 20–21. There is no justification for that anomaly.

First, respondent cannot explain why a debtor's payments to the Chapter 13 trustee "belong to creditors" in "escrow" when the Chapter 13 case ends *in conversion*, but not when it ends *in dismissal*. The fact is, undistributed funds are property of the estate in either case, and they are restored to the debtor unless there is "bad faith" (upon conversion, see § 348(f)) or "cause" (upon dismissal, see § 349(b)).

Second, respondent's reliance (at 43) on "state-law remedies" available to creditors after dismissal does not help. If petitioner had dismissed his case and received his undistributed plan payments, he could have used those funds to pay non-dischargeable debt (like student loans) or post-petition obligations. That is the same use to which petitioner could have put those funds if they had been refunded to him upon conversion. In practical terms, the end result would be the same. There is no basis for believing that petitioner's unsecured creditors could have "attach[ed]" the funds at issue upon dismissal and ended up in the same position they were in after respondent's post-conversion disbursements.[7]

3. The $4,319 at issue was not petitioner's "*quid pro quo*" for any "benefits" his Chapter 13 creditors provided to him. Br. 46; see also *id.* at 27–28 & n.6. As we have explained (Pet. Br. 45–46), those

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[7] Respondent mistakenly assumes, moreover, that any Chapter 7 filing by a debtor following voluntary dismissal of a Chapter 13 case would be prevented as "[b]ad-faith gamesmanship." Br. 44 n.12. Exercising rights that the statute affords is not bad faith. Cf. 3 *Collier on Bankruptcy* § 348.07, at 348-25 (16th ed., Alan N. Resnick & Henry J. Sommer eds., 2012).

creditors had no "benefits" to give. They stood to receive nothing in petitioner's no-asset Chapter 7 case, so they *gave up* nothing while petitioner pursued an unsuccessful attempt to repay them under Chapter 13.

More generally, debtors and creditors alike benefit from good-faith attempts to pay claims under Chapter 13 rather than liquidation under Chapter 7.[8] A Chapter 13 debtor's obligation—the "bargain" he makes under that Chapter—is to fund his estate on a monthly basis out of his disposable income. Those funds become *available* for disbursement to creditors under a confirmed plan (subject to its contingencies). But nothing in Chapter 13 makes those funds a sort of monthly Chapter 13 subscription fee to creditors who stand to *gain* from the debtor's voluntary election of such a proceeding. Contra NACTT Br. 17–18 (analogizing a debtor's plan payments to life-insurance premiums).

4. Respondent's concern that refunding post-petition plan payments to debtors on conversion will lead to creditor "demands for daily distributions" and an "'administrative nightmare'" is unfounded. See Br. 30 (quoting *In re Redick*, 81 B.R. 991, 886 (Bankr. E.D. Mich. 1987)). Respondent provides no evidence that the sky has fallen in any of the many jurisdictions where petitioner's reading of the statute

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[8] Br. 46 ("[C]hapter 13 is intended to be advantageous for debtors and creditors alike."); AFSA Br. 4 ("[U]nsecured creditors often receive more under a Chapter 13 plan than in a Chapter 7 liquidation"); NACTT Br. 7 ("Congress favors Chapter 13 because it promises better results for both debtors *and* creditors.").

has prevailed for some time. That is not surprising. Nothing in bankruptcy law obligates Chapter 13 trustees to accede to demands for distributions so frequent that they become "*de minimus*" while imposing an unreasonably "skyrocket[ing]" cost. *Ibid.* (same).

5. Finally, even if respondent and her *amici* had the better of these policy arguments, they would still be making them to the wrong branch of government. Congress authorized debtors to convert from Chapter 13 to Chapter 7 "at any time," and Congress provided for post-petition earnings to remain "property of the estate in the converted case" only when such a conversion was made in bad faith. The natural consequence of those policy choices is to give debtors—not creditors, and not trustees—control over the timing of conversion. In the end, respondent's quarrel is with Congress.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment should be reversed.

Respectfully submitted.

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No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER MORTGAGE COALITION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA's members frequently hold secured or unsecured claims in Chapter 13 bankruptcy cases that are converted to Chapter 7.

The Consumer Mortgage Coalition is a trade association of national mortgage lenders, servicers and service providers. Its members participate in every stage of the home financing process, from providing loan information and taking loan applications to processing and funding loans, to purchasing loans from brokers and other lenders, and to pooling loans for sale on the secondary market as mortgaged backed securities. The Coalition acts to pursue reform of the mortgage origination process, to assure that consumers are properly informed when making credit choices, and to reduce abusive lending practices. It participates

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[1] No party or party's counsel authored the proposed *amici curiae* brief in any part, nor did any party or party's counsel, or any person other than the *amici*, its members, or its counsel, contribute money that was intended to fund preparing or submitting this brief. Each of the parties have consented to the filing of this brief.

in almost every aspect of federal legislative activity and regulatory rulemaking relating to the mortgage industry.

SUMMARY OF THE ARGUMENT

The post-petition earnings that a debtor pays to a Chapter 13 trustee, who acts as disbursing agent pursuant to a plan, are the *quid pro quo* for a debtor's enjoyment of the expanded benefits that Chapter 13 provides. This premise, which permeates Chapter 13, and the language Congress adopted in several sections of the Bankruptcy Code, demonstrate that earnings submitted to the supervision and control of the trustee under a confirmed plan should be paid pursuant to the plan, even if the case is subsequently converted.

Bankruptcy Code § 1326 offers the most direct statutory authority for this rule. Section 1326(a)(1) requires Chapter 13 debtors to begin making plan payments promptly after the commencement of the case. Section 1326(a)(2), in turn, requires a Chapter 13 trustee to distribute such payments in accordance with the confirmed plan as soon as is practicable. As the majority of the bankruptcy courts addressing the question presented have concluded, these provisions govern all payments received by the trustee during the course of the Chapter 13 case, not merely the payments due in the period prior to plan confirmation. Section 1326(c) reinforces this principle by providing that the trustee shall make payments to creditors under a confirmed plan unless the plan or the confirmation order provides otherwise.

Bankruptcy Code § 348(f) makes clear that earnings submitted to the supervision and control of the trustee do not ordinarily become property of the Chapter 7 estate upon conversion. Section 348(f), however, does not direct whether the trustee should distribute these funds in accordance with the plan or refund the money to the debtor.

Similarly, §§ 1306 and 1327 do not control the question presented. A contextual reading indicates that Congress did not intend these sections to cause undisbursed plan payments to "revest" in the debtor at conversion. Nothing in the Bankruptcy Code retroactively invalidates the plan upon conversion to cause the funds to revert to the debtor either. Thus, funds already submitted to the supervision and control of the trustee prior to conversion should be paid according to the plan.

The rule adopted by the Court below, that plan payments held by the trustee at the time of conversion should be paid to creditors, does not discourage Chapter 13 filings. To the contrary, it follows the debtor's expectation at the outset of a Chapter 13 case. A corollary to the debtor's commitment of post-petition earnings to the plan is that the trustee will pay those funds to creditors as directed by the confirmed plan.

ARGUMENT

I. The Structure of Chapter 13 Provides Debtors with Broad Benefits in Exchange for Committing a Portion of Their Post-Petition Earnings to the Payment of Pre-Petition Claims

Congress has demonstrated a preference for individual debtors to attempt to repay their creditors under the terms of a plan governed by Chapter 13 of the Bankruptcy Code rather than filing under Chapter 7. *See McDonald v. Master Fin., Inc.* (*In re McDonald*), 205 F.3d 606, 614 (3d Cir. 2000). Part of the reason is that unsecured creditors often receive more under a Chapter 13 plan than in a Chapter 7 liquidation. *Id.*

Chapter 7 and Chapter 13 have significantly different structures. In Chapter 7, non-exempt pre-petition assets are turned over to a trustee for liquidation. *In re Magee*, 444 B.R. 254, 262 (Bankr. S.D.N.Y. 2011). In contrast, Chapter 13 allows debtors to retain their non-exempt pre-petition property in exchange for funding the Chapter 13 plan with a portion of their post-petition earnings. *McDonald v. Burgie* (*In re Burgie*), 239 B.R. 406, 410 (B.A.P. 9th Cir. 1999). Thus, a Chapter 13 trustee's duties are not identical to the duties of a Chapter 7 trustee. *See* 11 U.S.C. § 1302; Resp. Br. at 4. Noticeably absent from a Chapter 13 trustee's duties is the responsibility set forth in § 704(a)(1) "to collect and reduce to money the property of the estate for which such trustee serves . . . ." 11 U.S.C. § 1302(b)(1).

Using a Chapter 13 plan may enable a debtor to save a home from foreclosure, or maintain possession of a vehicle or other personal property, by curing a delinquency over time rather than all at once as state laws often provide. *In re Michael*, 699 F.3d 305, 318 n.1 (3d Cir. 2012) (Roth, J., dissenting). Moreover, subject to certain exceptions, Chapter 13 debtors may also "cram down" certain secured debts and "strip off" junior liens. *See* 11 U.S.C. §§ 506(a), 1322(b) and 1325(a)(5)(B)(ii). Further, the "superdischarge" available in Chapter 13 relieves debtors from liabilities that may not be discharged in Chapter 7. *See Mele v. Mele* (*In re Mele*), 501 B.R. 357, 368 n.10 (B.A.P. 9th Cir. 2013).

Another benefit enjoyed by Chapter 13 debtors is the protection of the automatic stay for the entire payment period of the Chapter 13 plan, usually from three to five years. *In re Valone*, 500 B.R. 645, 650-51 (Bankr. M.D. Fla. 2013). That generally prevents creditors from enforcing their contractual or legal rights against the debtor or any collateral while the Chapter 13 case continues. *See* 11 U.S.C. § 362(a).

As only a debtor can propose a Chapter 13 plan, there is no risk of a creditor filing a competing plan of full or partial liquidation. 11 U.S.C. § 1321. Upon confirmation of a Chapter 13 plan, its provisions "bind the debtor and each creditor, whether or not the creditor has objected to, has accepted, or has rejected the plan." *See* 11 U.S.C. § 1327(a). Thus, Chapter 13 plans are variously referred to as a legislative "contract," the "Chapter

13 Deal," or the "Chapter 13 bargain." *See In re Forte*, 341 B.R. 859, 869 (Bankr. N.D. Ill. 2005).

The *quid pro quo* for the expanded benefits a debtor receives in Chapter 13 is the commitment of a portion of his or her post-petition earnings to funding the Chapter 13 plan. *Michael*, 699 F.3d at 319 (Roth, J., dissenting). Congress emphasized a *quid pro quo* concept in Chapter 13 by requiring that debtors commence plan payments shortly after filing. *See* 11 U.S.C. §1326(a)(1). Chapter 13 is not intended to give debtors a "free ride." *In re Miller*, 247 B.R. 795, 797 (Bankr. W.D. Mo. 2000). Once confirmed, a Chapter 13 plan typically provides for the trustee to make deferred cash payments to pre-petition creditors from the future earnings a debtor commits to the plan. *See* 11 U.S.C. §§ 1322(a)(1) & 1326(c).

Congress said nothing about returning to a debtor funds that a debtor has paid to a Chapter 13 trustee under a confirmed plan. The only time the Bankruptcy Code mentions returning funds a Chapter 13 trustee has received from a debtor is when a plan is *not* confirmed, see 11 U.S.C. § 1326(a)(2), and that occurs whether the case is then converted to another Chapter, as in this case, or dismissed. *See id.* §§ 1307(a)–(c).

Conversion or dismissal of a Chapter 13 case after confirmation of a plan relieves a debtor of the obligation to continue making payments to a trustee. *See In re Doyle*, 11 B.R. 110 (Bankr. E.D. Pa. 1981). Nothing in Chapter 13, however, provides a debtor

with retroactive relief to, in effect, claw back payments that were made to a trustee while both the debtor and his creditors were bound by a confirmed plan. *See* 11 U.S.C. § 1327(a).

Whether creditors should receive the *quid pro quo* contemplated by the structure of Chapter 13 should not depend on whether a trustee has distributed the payments received from the debtor at the time of conversion. Such a ruling would subject creditors to undue risk resulting from "the trustee's [lack of] speed in distributing the payments" or simply a debtor's timing in converting a case relative to a trustee's payment cycle. *Harris v. Viegelahn (In re Harris)*, 757 F.3d 468, 480 n.10 (5th Cir. 2014) (citing *In re Waugh*, 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988)). This Court should not permit happenstance, or debtor opportunism, to determine creditors' rights to payments already submitted to a trustee and then due and owing to creditors under a Chapter 13 plan.

II. Section 1326 Reflects the Intent of Congress that the Chapter 13 Trustee Distribute Undisbursed Funds Held at Conversion as Directed by the Confirmed Plan

"In ascertaining the plain meaning of [a] statute, the [C]ourt must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Section 1326, through its express language and its fit within the design of Chapter 13, demonstrates

congressional intent that Chapter 13 trustees distribute funds held at conversion according to the confirmed plan.

A. The "Plain Meaning" of § 1326 Requires Trustees to Disburse the Funds in Question According to the Plan

Section 1326(a)(1) requires that Chapter 13 debtors commence making payments in the amounts proposed by their plans to Chapter 13 trustees within 30 days after the earlier of filing their plans or entry of the order for relief. *See* 11 U.S.C. §§ 301(b), 348(a) & 1326(a)(1). That section does not provide an end date for the payments.

Section 1326(a)(2) then provides,

> A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

11 U.S.C. § 1326(a)(2).

When no plan is confirmed,[2] Congress provided that the Chapter 13 trustee would return funds to the debtor that are "not previously paid and not yet due and owing to creditors." 11 U.S.C. § 1326(a)(2).[3] If a plan is confirmed, § 1326(a)(2) should be read to require the trustee to disburse both pre- and post-confirmation payments according to the plan because, as noted above, § 1326(a)(1)(A) is not restricted to pre-confirmation payments. Section 1326(a)(1)(A) simply provides a starting

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[2] When a Chapter 13 debtor cannot confirm a plan, the Chapter 13 case cannot continue, and the only available outcomes are conversion or dismissal. *See* 11 U.S.C. § 1307(5). Had Congress similarly intended for debtors to receive a return of funds upon conversion or dismissal *after* confirming a plan, Congress could have included a parallel provision in §§ 1326 or 348. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[3] Under the express language of § 1326(a)(2), a debtor is not entitled to the return of undisbursed moneys then "due and owing to creditors pursuant to paragraph (3)" as adequate protection payments. *See* 11 U.S.C. § 1326(a)(3). In addition, the trustee is authorized to deduct the amount of any unpaid administrative claims under § 503(b) before returning the balance of any payments made under a non-confirmed plan. *See* 11 U.S.C. § 1326(a)(2); *see also In re Inyamah*, 378 B.R. 183, 185 (Bankr. S.D. Ohio 2007). It would be inconsistent to provide for the return of all undisbursed funds to the debtor upon subsequent failure of a confirmed plan when Congress expressed clear intent not to pay all undisbursed funds to the debtor upon denial of confirmation, if those sums were then due and owing to creditors for adequate protection or as administrative claims.

point for payments. Thus, requiring a trustee to "distribute any [payment made under paragraph (1)(A)] in accordance with the plan as soon as is practicable" refers to all payments a Chapter 13 trustee receives, no matter when received. *See id.*

There are at least three different judicial interpretations of whether § 1326 answers the question presented. One line of cases concludes that § 1326(a)(2) does not apply to payments received post-confirmation. *See, e.g., In re Boggs*, 137 B.R. 408, 410 (Bankr. W.D. Wash. 1992) (concluding that § 1326 only answers the "questions of when plan payments are to begin, the disposition of funds in the event no plan is confirmed, and who is to handle the funds"). The shortcoming in these decisions is that they overlook that § 1326(a)(1) is not limited to pre-confirmation payments.

A second line of cases, representing the majority, correctly concludes that § 1326(a)(2) instructs Chapter 13 trustees how to distribute all plan payments, regardless of when received. *See, e.g., In re Pegues*, 266 B.R. 328 (Bankr. D. Md. 2001) (collecting cases); *see also In re Parrish*, 275 B.R. 424, 433 (Bankr. D.D.C. 2002) (holding that § 1326(a)(2) mandates that a chapter 13 trustee distribute post-confirmation funds to creditors even upon case dismissal).

Other courts in a third line of cases find that § 1326(a)(2) does not directly answer the question, but read §§ 1326(a)(2) and 1326(c) together to discern a broader congressional purpose to give creditors a vested right to plan payments that a Chapter 13

trustee received after confirmation. *See, e.g., In re Smith*, 511 B.R. 612 (Bankr. W.D. Mo. 2014) ("When [Section 1326(a)(2)] is considered together with the Section 1326(c) requirement that the trustee shall make payments to creditors ... one can reasonably infer that Congress intended that post-confirmation payments made pursuant to the plan are likewise to be distributed to creditors provided for by the plan.").

Section 1326(c) fully supports this conclusion. Unless a plan or confirmation order makes someone other than a Chapter 13 trustee the disbursing agent for plan payments, this provision obligates the trustee to make payments according to the confirmed plan. *Arkison v. Plata* (*In re Plata*), 958 F.2d 918, 923 (9th Cir. 1992) (Brunetti, J., dissenting) (interpreting identical provision in Chapter 12). No provision in the Bankruptcy Code other than § 1326 addresses the distribution of funds submitted to the trustee under a confirmed plan. This means that post-confirmation Congress intended for the confirmed plan itself to control the disbursement of funds. *See* 11 U.S.C. §§ 1326(a)(2), (c).

The most logical interpretation of § 1326 is one that is consistent with its language and the structure of the Bankruptcy Code. *See In re Darden*, 474 B.R. 1, 8 (Bankr. D. Mass. 2012) (quoting *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)) ("'Statutory construction . . . is a holistic endeavor' where isolated provisions ought to be interpreted to produce a 'substantive effect that is compatible with

the rest of the law.'"). The interpretation of § 1326 that once a bankruptcy court confirms a Chapter 13 plan, payments made to a Chapter 13 trustee pursuant to the plan should be distributed according to the plan, is both consistent with the language Congress chose for § 1326 and the design of Chapter 13. Thus, the "plain meaning" of § 1326 should be respected and, because "the statute is clear and unambiguous, 'that is the end of the matter.'" *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (quoting *K mart*, 486 U.S. at 291-92).

B. Even if Not Evident from its "Plain Meaning," § 1326 Suggests Congress Intended That Creditors Have a Superior Interest in Undisbursed Funds Paid to a Trustee Under a Confirmed Plan

Even if this Court finds that the plain meaning of § 1326 does not answer the question, the Court should find, as did the Court below, that Petitioner's creditors had a right to receive the undisbursed funds held by the trustee upon conversion. The creditors hold the superior right to the funds based upon the bargain represented by a confirmed Chapter 13 plan. *Harris*, 757 F.3d at 480-81.

This Court need not characterize the interest of creditors in the funds at issue as a vested right. The Bankruptcy Code does not expressly use the term "vest" with respect to the rights of creditors to receive funds voluntarily paid by a debtor under a confirmed plan. While property of the estate is to "vest" in the debtor upon confirmation, unless the plan provides otherwise, see 11 U.S.C. § 1327(b), the

Bankruptcy Code does not characterize the payments received by the trustee as property of the estate, as discussed *infra* pp. 19–21, nor does it state that any party is vested in the funds under a trustee's supervision and control.

The Court below found that creditors' rights to funds held by a Chapter 13 trustee derive from § 1327(a): "When confirmed, the plan governs the relations of the parties and the debtor is bound to make the specified payments provided in the confirmed plan." *Harris*, 757 F.3d at 478. "Or, in other words, 'the attached wages are the *quid pro quo* that the debtor has given up during the pendency of the reorganization in return for being permitted to stave off foreclosure and cure the mortgage default, retain the use of his automobile, and enjoy the automatic stay.'" *Id.* at 480 (quoting *Michael*, 699 F.3d at 320 (Roth, J., dissenting)). Thus, if the creditors were not permitted to receive the funds paid to the trustee under the plan, they will have lost their benefit of the bargain represented by the confirmed plan while the debtor has enjoyed the benefits perceived to flow from the plan he proposed.

III. Bankruptcy Code Provisions Excluding Certain Property from the Post-Conversion Chapter 7 Estate Do Not Answer the Question Presented

Section 348(f) of the Bankruptcy Code provides that property of the converted Chapter 7 estate includes only assets that the debtor held as of the Chapter 13 petition date and over which the

debtor still retains possession or control. *See* 11 U.S.C. § 348(f)(1)(A). Petitioner argues that § 348(f) grants a debtor rights to undisbursed funds held by the Chapter 13 trustee upon conversion of the case to Chapter 7. Nothing in § 348(f), however, suggests that result.

Congress enacted § 348(f) to address an altogether different issue. As discussed in the Brief of Respondent, Congress added § 348(f) for the ostensive purpose of overruling the holding in *In re Lybrook*, a Seventh Circuit decision that adopted a rule of "once in, always in" for determining what property became part of the converted Chapter 7 bankruptcy estate. *See* Res. Br. at 33-34; *see also In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991).

Congress adopted an alternate approach by creating a default rule for converted cases, treating the Chapter 13 petition as though it was filed under Chapter 7. Under § 348(f)(1), the converted Chapter 7 estate is limited to pre-petition property that the debtor still possesses or controls at conversion. Stated differently, Congress chose not to punish debtors solely for a failed attempt at Chapter 13 by creating an enlarged Chapter 7 estate. Yet, in enacting § 348(f), nothing in the text of § 348(f) or its legislative history suggests that Congress intended to modify the structure of Chapter 13 by which debtors commit all their disposable income from their post-petition earnings as the primary means to fund a Chapter 13 plan. *See* 11 U.S.C. § 1325(b)(1) (To confirm a plan over an objection, the debtor must

commit to pay creditors all "projected disposable income" during the applicable commitment period.).

Petitioner argues that post-petition earnings held by the Chapter 13 trustee at conversion should be returned to the debtor.[4] To hold otherwise, Petitioner asserts, would create a disincentive to file Chapter 13 contrary to Congressional intent in enacting § 348(f). Pet. Br. at 11. The irony in Petitioner's position, of course, is that Chapter 13 contemplates that post-petition earnings will be the primary source of payment to creditors in Chapter 13. *See* 11 U.S.C. § 1325(b)(1)(B). Thus, requiring a trustee to turn over the funds in question should not serve as a disincentive for debtors to seek Chapter 13 relief; disbursing the funds to creditors is precisely what the parties intended at the time the payments were made. Creditors will receive only the funds the debtor earmarked for them in the plan and paid to them through the trustee when those payments were due.[5]

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[4] "Such a result not only would be patently unfair, but also contradict the reasoning of [*In re Bobroff*, 766 F.2d. 797 (3d Cir. 1985)]. [The debtor] would be in a better position (and his creditors in a worse position) than he would have been if he had initially filed for bankruptcy under Chapter 7." *See In re Michael*, 699 F.3d 305, 320 (3d Cir. 2012) (Roth, J., dissenting).

[5] Many districts, known as "conduit mortgage districts," require debtors to make mortgage payments through the Chapter 13 trustee, rather than directly to the creditor outside the plan. *See, e.g.*, Local Bankr. R. 3015-1(b) (S.D. Tex.); *see also In re Heinzle*, 511 B.R. 69, 73–74 (Bankr. W.D. Tex. 2014). It would be inconsistent to permit secured creditors paid directly to retain payments, but require a trustee to return undisbursed funds paid to the trustee as a conduit.

Nor would paying creditors any funds held by the trustee under the plan prior to conversion effectively nullify the "bad faith" exception in § 348(f)(2). Under that exception, a bankruptcy court can order other post-petition earnings or assets, not simply those earnings the debtor had committed to and paid under a Chapter 13 plan, to become property of the Chapter 7 estate.

The "bad faith" exception was not enacted to address the disposition of post-petition earnings intended for plan payments. Prior to 1994, the Bankruptcy Code already contemplated that post-petition earnings, to the extent not needed for living expenses, ordinarily would be paid to creditors in the plan. *See* 11 U.S.C. §1325(b). In 1994, Congress added the "bad faith" exception in § 348(f)(2) so that bankruptcy judges would have the discretion "to order that *all* property held at the time of the conversion shall constitute property of the estate in a converted case." H.R. Rep. No. 835, 103d Cong. 2d Sess. 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 3366 (emphasis added). Thus, through § 348(f)(2), Congress empowered bankruptcy judges to address potential abuses of the "absolute" right to convert a case to Chapter 7 in the event a debtor were, for example, to receive a substantial asset post-petition and yet, in bad faith, elect not to modify the plan to share that asset with creditors. *See, e.g., Moser v. Mullican* (*In re Mullican*), 417 B.R. 389 (Bankr. E.D. Tex. 2008), *aff'd*, 417 B.R. 408 (E.D. Tex. 2009) (finding case was converted in bad faith where debtors were current on their plan payments, inheritance would have paid creditors in full, debtors

instead paid family member debts, spent portion of inheritance, and made false representations about use of proceeds).[6]

IV. Undisbursed Plan Payments Committed to the Supervision and Control of the Trustee Under a Confirmed Plan Do Not "Revest" in the Debtor at Conversion

The Court below correctly concluded that the funds in question do not "revest" in the debtor at conversion. *Harris*, 757 F.3d at 478 n.8. Once the debtor makes payment to the trustee from his earnings under the confirmed plan, the debtor is not entitled to possession nor is the debtor vested with any interest in those payments. *Id.* at 477–78. The Court below also declined to hold that creditors had a vested interest in undisbursed funds in the hands of the trustee, as other courts have found. *See, e.g., In re Waugh*, 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988) (holding that creditors have a "non-divestible

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[6] Most reported decisions addressing the bad faith exception in § 348(f)(2) involve a debtor obtaining a significant asset during the Chapter 13 case, often through inheritance, similar to the facts in *Lybrook*. *See, e.g., In re Castillo*, 508 B.R. 1 (Bankr. W.D. Tex. 2014) (post-petition inheritance); *In re Doetsch*, No. 04-63998, 2007 WL 2702645 (Bankr. N.D.N.Y. Sept. 12, 2007) (same); *In re Messer*, No. 96-550617, 2000 WL 33673748, at *3 (Bankr. M.D.N.C. Nov. 22, 2000) (same); *see also In re Siegfried*, 219 B.R. 581 (Bankr. D. Colo. 1998) (right to overbid at foreclosure); *In re Bejarano*, 302 B.R. 559 (Bankr. N.D. Ohio 2003) (post-petition tax refund and personal injury claim); *In re Wiczek-Spaulding*, 223 B.R. 538 (Bankr. D. Minn. 1998) (separation payment); *In re Reeves*, 509 B.R. 35 (Bankr. S.D. Tex. 2014) (retroactive benefit payment, monthly income from new business venture and collection of large receivable).

right to plan payments"); *In re Lennon*, 65 B.R. 130, 136, 137 (Bankr. N.D. Ga. 1986) (same). Nevertheless, the Court below correctly held that a confirmed plan directs what a trustee must do with funds paid by the debtor under the plan. Creditors are entitled to the *quid pro quo* of the debtor's enjoyment of the plan and thus, between creditors and Petitioner, creditors have a superior claim to the funds. *Harris*, 757 F.3d at 481.

A. The Debtor is Not Vested in Payments Made to the Trustee from Post-Petition Earnings under a Confirmed Plan

This Court, like the Fifth Circuit, should reject the notion that the debtor was vested with an interest in the funds at issue. As the Court below explained, "[t]hese payments are specifically earmarked and set aside for distribution to creditors provided for by the confirmed plan. To the extent that the confirmed plan provides for payment from debtor's future earnings and the debtor actually makes payment to the trustee pursuant to that plan, the debtor is not entitled to possession nor is the debtor vested with title to such payments." *Harris*, 757 F.3d at 478 (quoting *Lennon*, 65 B.R. at 136).

It is axiomatic that, once turned over to the Chapter 13 trustee under a confirmed plan, moneys from earnings are under the "supervision and control of the trustee," as contemplated by § 1322(a)(1), and the debtor no longer has possession or control of the funds.

Similarly, a debtor no longer has a vested interest in the funds. Once a plan is confirmed, the Chapter 13 trustee is required to pay to creditors funds under the proposed plan received both pre-confirmation and post-confirmation. *See* 11 U.S.C. § 1326(a)(2) ("[T]he trustee shall distribute any such payment in accordance with the plan as soon as is practicable."); *see also* § 1326(c) ("Except as otherwise provided in the plan or the order confirming the plan, the trustee shall make payments to creditors under the plan.").

B. Plan Payments Made to the Trustee Are Not Property of the Estate, and Conversion Does Not "Revest" Plan Payments in the Debtor

With no right to possession and no vested interest immediately following submission of earnings to the trustee, Petitioner asserts that conversion "revested" the debtor with such rights by operation of § 1327(b) and the order confirming Petitioner's plan. Pet. Br. at 13. That result is wholly unsupported by the language and purpose of the vesting provision, § 1327(b).

First, § 1327(b) provides that confirmation is the event that vests all property of the estate in the debtor (absent a provision to the contrary in the plan or the confirmation order).[7] The statute does not

[7] Nothing about the vesting provision in Petitioner's plan alters the vesting analysis with respect to payments made to the trustee under the plan. *See, infra*, pp. 22–24.

mention conversion and does not itself cause any vesting to occur upon conversion.

Second, the vesting provision in § 1327(b) applies only to property of the estate, which does not include funds previously submitted to the trustee under the plan.[8] Section 1306 determines what is property of the estate in Chapter 13, and includes "earnings from services performed by the debtor after commencement of the case but before the case is closed, dismissed, or converted . . . ." 11 U.S.C. §1306(a)(2). A debtor's post-petition earnings, however, lose their character as "earnings" when they are paid to the Chapter 13 trustee pursuant to a confirmed plan. As the dissent in *Michael* observed, when in the hands of the trustee, "we are not dealing simply with wages here but with that portion of the wages that had been attached under the plan and paid to the trustee for distribution to the creditors."[9] *Michael*, 699 F.3d at 320. Once paid

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[8] A number of courts have directly or indirectly reached this conclusion by holding that creditors are vested with an interest in funds submitted to the control and supervision of a trustee pursuant to a confirmed plan. *See In re Verdunn*, 210 B.R. 621, 626 (Bankr. M.D. Fla. 1997); *In re Halpenny*, 125 B.R. 814, 816 (Bankr. D. Haw. 1991); *Ledford v. Burns* (*In re Burns*), 90 B.R. 301, 304-05 (Bankr. S.D. Ohio 1988); *In re Lennon*, 65 B.R. 130, 137 (Bankr. N.D. Ga. 1986); *see also In re Parrish*, 275 B.R. 424, 432 (Bankr. D.D.C. 2002) ([T]he estate could alternatively be viewed as continuing to have legal title to the funds, with the creditors vested with ownership of the equitable interest in the funds as beneficiaries of a trust created by the terms of the confirmed plan.").

[9] The conclusion that payments made to a trustee under a confirmed plan are not property of the estate is consistent

to the trustee, those funds can no longer be characterized as "earnings" any more than one would characterize as "earnings" wages previously spent on milk and bread, or used to pay post-petition mortgage payments or rent.

Third, if previously submitted funds were to be viewed as property of the estate, §§ 1306 and 1327 would conflict with the clear direction provided in § 1326 on how trustees are to disburse funds submitted to their supervision and control. Specifically, § 1306(b) provides a default rule that "the debtor shall remain in possession of all property of the estate." Section 1327(b) establishes a default rule that "the confirmation of a plan vests all of the property of the estate in the debtor." Section 1327(c) further provides that, absent a plan or confirmation order providing otherwise, "property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan." Reading these statutes to treat plan payments submitted to the trustee as property of the estate would cause § 1306(b) to grant possession to the debtor of pre-confirmation payments under the plan. Similarly, § 1327(b) would vest in the debtor pre-confirmation plan

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with the duties Chapter 13 trustees are and are not given by statute. As discussed, *supra* p. 4, nothing in § 1302 suggests that the Chapter 13 trustee is to collect property of the estate under a confirmed plan. The trustee collects funds via monthly payments made by the debtor out of estate property that vested in the debtor upon confirmation. *See* 11 U.S.C. § 1322(a)(1). The funds paid, however, once under the trustee's supervision and control, are not property of the estate because they no longer are post-petition earnings.

payments free of any interest of creditors despite later confirmation of the plan. Those results would directly conflict with § 1326(a)(2)'s express instruction to the trustee to pay such funds "in accordance with the plan as soon as is practicable." 11 U.S.C. § 1326(a)(2). The proper and more harmonious reading of those statutes is that Congress intended to address estate assets, which will remain in the debtor's possession and control during the pendency of the Chapter 13 case, not to direct the distribution of payments submitted to the trustee under a proposed or confirmed plan. Section 1326, titled "Payments," already accomplishes that task.

C. Neither Petitioner's Plan Nor the Confirmation Order Dictate a Different Result

Some Chapter 13 plans and confirmation orders, including in Petitioner's case, delay the vesting of property of the estate in the debtor. The "delayed vesting" provision is used in some jurisdictions to provide a debtor with more protection from post-petition creditors than otherwise may be available under the automatic stay if vesting occurred at confirmation.[10] *See In re Jemison*, No. 07-40761, 2007 WL 2669222, at *3 (Bankr. N.D. Ala. Sept. 6, 2007).

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[10] If property of the estate is vested in the debtor and thus no longer property of the estate, it would not be subject to the protections of the automatic stay under § 362(a)(3) or (a)(4), which prohibits acts against property of the estate by holders of both pre- and post-petition claims.

The "delayed vesting" provision in the order confirming Petitioner's plan provides, "Such property as may revest in the Debtor shall so revest only upon further Order of the Court or upon dismissal, conversion, or discharge."[11] J.A. 48. The Court below declined to "define with precision the property that 'may revest in the Debtor.'" *See Harris*, 757 F.3d at 478 n.8. According to the Court, such a ruling was unnecessary because, by requiring Petitioner "to pay part of his wages to the trustee for distribution to creditors, the order clearly did not contemplate that such payments would revest in" Petitioner.[12] *Id.* Stated differently, nothing in the order or in the vesting provision, § 1327(b), suggests that Congress intended for earnings to make a round-trip, that is, to be possessed and vested in the

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[11] Petitioner's plan is based on the form Chapter 13 plan published by the U.S. Bankruptcy Court for the Western District of Texas, San Antonio Division. *See* Chapter 13 Plan Form – San Antonio Division, *available at http://www.txwb.uscourts.gov/sites/default/files/file/order_ch13_pln_san_antonio.pdf* (last visited, Mar. 3, 2015). The "as may revest" language in the confirmation order is not part of the form chapter 13 plan. A number of other jurisdictions have adopted form Chapter 13 plans that do not contain the "as may revest" language, and explicitly provide, "*All* property shall remain property of the estate and shall vest in the debtor only upon dismissal, discharge, or conversion." *See, e.g.*, *Harris v. Washington Mutual Home Loans, Inc.* (*In re Harris*), 297 B.R. 61, 72 (Bankr. N.D. Miss. 2003) (emphasis added).

[12] Funds paid to the trustee under the plan *post*-confirmation are not funds "as may revest" in the debtor; they are funds that, but for the language of Petitioner's plan, would have vested in the debtor at confirmation, but were subsequently paid out of the estate to the trustee under the plan.

debtor at confirmation, but after being voluntarily paid to the trustee under the plan, to vest in the debtor again following conversion.

Regardless of when vesting occurs under a plan or confirmation order, payments that are made from the debtor's earnings to the trustee will not subsequently vest or revest in the debtor. Congress intended that the confirmed plan, as a "court-sanctioned contract that binds the chapter 13 debtor and its creditors," *In re Stuart*, 402 B.R. 111, 126 (Bankr. E.D. Pa. 2009), govern the rights of creditors to funds submitted to the supervision and control of the trustee, regardless of when property of the estate vests in the debtor. Both the debtor and his creditors are bound to the terms of a confirmed plan, 11 U.S.C. § 1327(a), and Petitioner's plan called for money paid to the trustee from Petitioner's earnings to be distributed to creditors by the trustee. *See* J.A. 27 ("From the monthly payments described above, the Chapter 13 trustee shall pay the following allowed claims in the manner and amounts specified").

D. Conversion Does Not Invalidate Creditors' Rights to Funds Previously Submitted to the Trustee Under a Confirmed Plan

The fact that the proponent of a confirmed plan may later decide to convert the case to another chapter does not change the parties' rights concerning payments made to the trustee while the plan was effective. Petitioner's resort to § 348 to

support his "revesting upon conversion" argument is unavailing. Consistent with congressional purpose that § 348 not serve as "a source of disruption, but, instead, preserves the continuity of the bankruptcy proceedings," conversion does not invalidate any action taken by the debtor or creditors in the superseded case pursuant to a plan. *In re Verdunn*, 210 B.R. 621, 625 (Bankr. M.D. Fla. 1997).

Conversion does not vacate the Chapter 13 plan or have retroactive effect. *See* 11 U.S.C. § 1330 (omitting conversion as a triggering event for vacating an order of plan confirmation); *see also In re Markham*, 504 B.R. 1, 7 (Bankr. D. Mass. 2013) ("Nowhere in § 348 nor in any other provision of the Bankruptcy Code is there a suggestion that conversion from chapter 13 to chapter 7 vacates a confirmed plan"); *accord Behles-Giddens, P.A. v. Raft (In re K.D. Co.)*, 254 B.R. 480, 487 (B.A.P. 10th Cir. 2000) (chapter 11). Otherwise, Chapter 13 would prove unworkable as secured creditors, for example, would face the prospect of returning collateral surrendered under a confirmed plan upon conversion. *See In re Smith*, 511 B.R. 612, 616-17 (Bankr. W.D. Mo. 2014). Thus, while conversion relieves a debtor of the obligation to contribute additional funds to the plan, conversion does not invalidate a confirmed plan's direction that funds submitted to the trustee be paid to creditors.

This result is evident from the Chapter 13 trustee's role as disbursing agent. Once the debtor submits payments to the trustee's supervision and control, "[t]he trustee is the conduit for the funds to

get to the creditors." *Id.* at 317. Unlike the duties of a Chapter 7 trustee, "[t]he functions of the chapter 13 trustee are basically administrative, *e.g.*, review plans, advise the court on plans, and act as *disbursing agent*." *The Travelers Indemnity Co. of Illinois, Inc. v. Griner (In re Griner)*, 240 B.R. 432, 438 (Bankr. S.D. Ala. 1999) (emphasis added).[13] Thus, rights to the funds submitted to the trustee, acting as disbursement agent under a confirmed plan, already have been determined at conversion, and nothing in § 348 suggests that Congress intended to alter those rights *ex post facto*.

Practicalities also support this result. If Chapter 13 trustees were required to return undisbursed plan payments upon conversion, trustees would face unwarranted pressure to accelerate the distribution of payments. This could jeopardize equitable distribution of payments to all

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[13] The Bankruptcy Code presumes that the Chapter 13 trustee will act as "disbursing agent" under the plan, but the debtor may act as disbursing agent under certain circumstances. *See* 11 U.S.C. § 1326(c); *Mendoza v. Temple-Inland Mortgage Corp. (In re Mendoza)*, 111 F.3d 1264, 1269 (5th Cir. 1997). There is no workable distinction between payment to creditors directly, in cases where the debtor acts as his own disbursing agent, and submission of earnings to the supervision and control of the Chapter 13 trustee for the same purpose. Each instance involves a voluntary payment of the debtor "in order to fulfill his obligations under the reorganization plan and in exchange for the benefits he derives from the plan." *Michael*, 699 F.3d at 320. Petitioner does not argue that payments made directly to creditors are recoverable upon conversion, for good reason, and the same rule should apply to earnings submitted to the supervision and control of the trustee.

creditors of the same priority, as well as drive up the costs of administration.[14]

V. Section 348(e) Does Not Terminate a Chapter 13 Trustee's Obligation to Distribute Undisbursed Funds

Finally, a Chapter 13 trustee undoubtedly has duties to perform following conversion. *See* Fed. R. Bankr. P. 1019(5). Among other duties, monies held under the trustee's supervision and control, whether submitted under a proposed or a confirmed plan, must be paid by the trustee to someone.

Read literally, § 348(e) would prohibit Chapter 13 trustees from performing any tasks immediately upon conversion. The Court below reasonably observed that § 348(e) "cannot be taken too literally." If read literally, upon conversion a Chapter 13 trustee would be equally powerless to disburse funds to a debtor or creditors. This interpretation is unacceptable because it would lead to an absurd, or at least unreasonable, result. *See United States v. Am. Trucking Assns.*, 310 U.S. 534, 543 (1940).

The more reasonable interpretation of § 348(e) is that "there cannot be two trustees administering

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[14] In order to ensure equitable distribution to creditors, Chapter 13 trustees sometimes accumulate payments, rather than distribute the funds immediately. *Michael*, 699 F.3d at 316. This case is one example. Knowing that the mortgagee in this case might obtain relief from stay to liquidate its collateral in satisfaction of its claim, the Chapter 13 trustee held payments rather than face the prospect of seeking to recover the funds after payment. *See* Pet. App. 4a.; Resp. Br. at 10.

the same estate under the provisions of the new chapter." *Parrish*, 275 B.R. at 430. While there is evidence of a desire to avoid jurisdictional overlap, there also is evidence that Congress did not intend Chapter 13 trustees to have no further role in the case after conversion. *See, e.g.*, 11 U.S.C. §1326(a)(2) (requiring a Chapter 13 trustee to return funds to the debtor if the case is converted pre-confirmation, but subject to deducting adequate funds to pay allowed administrative expense claims); *see also* Fed. R. Bankr. P. 1019(5)(B)(ii) (requirement to file a final report and account with the United States Trustee). Indeed, the post-conversion tasks performed by the Chapter 13 trustee are necessary for the bankruptcy scheme to work seamlessly. The Court below correctly concluded that one of the remaining roles upon conversion is for the Chapter 13 trustee to distribute remaining funds to the parties with the best claim to them—creditors in this case.

Urging that the Fifth Circuit's approach in interpreting § 348(e) yields inconsistency as applied to different chapters, Petitioner argues that it would be absurd for a Chapter 7 trustee to distribute funds to creditors after conversion *from* Chapter 7. Pet. Br. at 12. Yet, the unique roles of Chapter 7 and Chapter 13 trustees explains any perceived inconsistency. The Chapter 13 trustee's role of the "disbursing agent" for monthly plan payments is entirely unique to Chapter 13.[15] There is nothing

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[15] Chapter 7 trustees also have persisting, albeit different, roles in cases converted *from* Chapter 7. *See In re Czykoski*, 320 B.R. 385, 390 (Bankr. N.D. Ind. 2005) (holding

inconsistent in reading § 348(e) to permit a Chapter 13 trustee to complete a task unique to that chapter. *See In re Redick*, 81 B.R. 881, 886 (Bankr. E.D. Mich. 1987) (at conversion, "the Chapter 13 trustee is, at the very least, a custodian of funds").

Petitioner further attempts to draw support from a perceived inconsistency that would arise when a Chapter 13 debtor dismisses a case, rather than converts to Chapter 7. Upon dismissal, Petitioner argues, § 349 requires the Chapter 13 trustee to disburse any post-petition wages on hand to the debtor. *See* 11 U.S.C. §349(b)(3). Petitioner theorizes that it would be illogical to return funds to a debtor in the event of dismissal but not upon conversion.

Petitioner's position that § 349 leads to a different result is not grounded in any specific statutory command. Similar to § 348, discussed *supra* pp. 24–26, § 349 is silent on whether funds in the hands of the Chapter 13 trustee should be paid to creditors upon dismissal. Several courts have concluded that § 349 does not instruct Chapter 13 trustees to return undisbursed funds to debtors for many of the same reasons that such an outcome is inappropriate upon conversion. *See, e.g., In re Criscuolo*, No. 09-14063, 2014 WL 1910078 at *8 (Bankr. E.D. Va. May 13, 2014) (holding that § 1326(a)(2) grants creditors the right to payment of the funds notwithstanding § 349(b)(3)); *In re Parker*, 400

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that Chapter 7 trustee retains standing to file motion to dismiss and assert claims in case converted from Chapter 7).

B.R. 55 (Bankr. E.D. Pa. 2009) (same); *In re Parrish*, 275 B.R. 424 (Bankr. D.D.C. 2002) (same).

Even if undisbursed funds should be returned to the debtor upon dismissal, which *Amici* dispute, there are ample reasons to justify a different result upon conversion. First, § 349(b)(3) "re-vests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." This provision has the impact of returning, to the extent possible, the debtor and creditors to the *status quo ante*. *See Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 698 F.3d 231, 238 (5th Cir. 2012). Upon dismissal, creditors' rights are restored. *See id.* The automatic stay is lifted to allow creditors to undertake collection action against the debtor and their collateral. Section 348, governing conversion, has no such language. Rather, Congress intended conversion to be a continuation of the bankruptcy case. *Verdunn*, 210 B.R. at 625. Upon conversion, although the Chapter 13 plan no longer will govern the conduct of the parties, the automatic stay continues and creditors are not restored to their pre-petition positions to the same extent as upon dismissal.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE G. ERIC BRUNSTAD JR. IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The undersigned *amicus curiae* is an Adjunct Professor of Law at the New York University School of Law and a frequent Visiting Lecturer in Law at the Yale Law School where he teaches courses on bankruptcy, secured transactions, business reorganizations and international insolvency law, commercial transactions, federal courts, and argument and reason. He began teaching at Yale in 1990, began teaching at NYU in 2012, and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author for Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. A copy of each party's consent is filed herewith.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 560 U.S. 770 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court numerous amicus briefs in bankruptcy cases, including *Wellness International Network, Ltd. v. Sharif*, 13-935 (2015); *Clark v. Rameker*, 134 S. Ct. 2242 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *RadLAX Gateway Hotel,*

LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012); *Hall v. United States*, 132 S. Ct. 1882 (2012); *Ransom v. FIA Card Servs.*, 562 U.S. 61 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The purpose of this brief is to address matters that bear on the Court's determination of an important and recurring bankruptcy issue: when a bankruptcy case is converted from Chapter 13 to Chapter 7, whether undistributed post-petition wages held by the Chapter 13 trustee should be returned to the debtor or distributed to creditors in accordance with the debtor's defunct Chapter 13 plan. In particular, the brief explains that section 348(f) of the Bankruptcy Code demonstrates Congress's intent that, following conversion, both debtors and creditors should be placed in the same economic position that they would have been in had the case been filed under Chapter 7 from the outset. Because a debtor's post-petition wages are not part of the Chapter 7 estate available to creditors, undistributed post-petition wages held by a Chapter 13 trustee should be distributed to the debtor and not to creditors following conversion of the case. This furthers Congress's intent to encourage debtors to at least attempt a

repayment plan under Chapter 13, rather than pursue liquidation under Chapter 7, by ensuring that debtors are not penalized for filing a Chapter 13 petition if they ultimately convert the case to Chapter 7.

Critically, returning undistributed post-petition wages to debtors upon conversion to Chapter 7 also serves to reinforce the strict voluntariness of the Chapter 13 process and the important constitutional value that the principle of voluntariness serves: under the Thirteenth Amendment, insolvent debtors cannot be forced involuntarily to work to pay off their debts. Unlike Chapter 13, Chapter 7 is not strictly voluntary—creditors may place a debtor into Chapter 7 against the debtor's will, either initially or by requesting conversion of the debtor's case from a proceeding under some other chapter. Further, a court may keep a debtor in Chapter 7 involuntarily by denying the debtor's motion to dismiss. Given that Chapter 7 cases may proceed involuntarily, Congress has determined that, consistent with Constitutional principles, the fruits of a debtor's human capital in the form of the debtor's post-petiton wages are not included as part of the Chapter 7 estate. Protecting this value, Congress has likewise determined that, when a case is converted from Chapter 13 to Chapter 7, undistributed funds from the defunct Chapter 13 case (which funds will be derived from the debtor's post-petition wages in almost every instance) are also

excluded from property of the Chapter 7 estate, and become property of the debtor. In this way, Congress has assured that a debtor's post-petition contribution of wages to the bankruptcy process remains strictly voluntary. The undersigned argues that the decision below should be reversed and the Court should hold that post-petition wages held by the Chapter 13 trustee at the time of conversion are the rightful property of the debtor.

STATEMENT

Petitioner Charles E. Harris, III (Harris) filed for bankruptcy relief under Chapter 13 of the Bankruptcy Code on February 24, 2010. Pet. App. 30a. At the time he filed his bankruptcy petition, Harris was $3,700 behind on his home mortgage loan. Pet. App. 3a. Under Harris's proposed Chapter 13 plan, he agreed to make his regular monthly mortgage payments in order to keep the home. Pet. App. 4a. In addition, his plan provided that the Chapter 13 trustee, Respondent Mary K. Viegelahn (Viegelahn), would, for a period of 60 months, take $530 per month out of Harris's post-petition income and distribute this to the mortgagee in order to pay in full his mortgage arrears and also to other creditors to pay certain other debts. Pet. App. 3a-4a. On April 15, 2010, the bankruptcy court confirmed the plan. Pet. App. 30a.

Harris was unable to stay current with his mortgage payments and, in October 2010, his mortgagee moved to lift the automatic stay to foreclose on Harris's home. Pet. App. 4a. The bankruptcy court granted the mortgagee's motion, and the mortgagee began foreclosure proceedings. *Id.* In the meantime, Viegelahn continued to receive $530 per month from Harris's wages, but ceased making payments to the mortgagee, resulting in funds accumulating in Viegelahn's possession. *Id.*

On November 22, 2011, Harris voluntarily converted his Chapter 13 case to Chapter 7 under 11 U.S.C. § 1307(a), which allows a debtor to "convert a case under [Chapter 13] to a case under chapter 7 of this title at any time." *Id.* While proceeding voluntarily under Chapter 13, Harris's bankruptcy estate included property and earnings, such as his wages, acquired "after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12." 11 U.S.C. § 1306. In Chapter 7, however, a different rule applies: although a debtor's nonexempt property existing at the time his petition is filed is liquidated to pay creditors, all post-petition earnings are generally outside the estate and beyond the creditors' reach. Pet. App. 5a (citing 11 U.S.C. § 541(a)). At the time of the conversion, Viegelahn held $5,519.22 of Harris's post-petition wages that she had yet to distribute to Harris's creditors. Pet. App. 4a. After making a payment

to Harris's attorney, Viegelahn distributed the remaining funds to creditors. *Id.* Harris moved to compel the return of the funds on the ground that Viegelahn lacked the authority to distribute them after the conversion of his bankruptcy to Chapter 7. Pet. App. 5a. On February 29, 2012, the bankruptcy court granted Harris's motion and ordered the funds returned to him. Pet. App. 31a-32a.

The district court affirmed the bankruptcy court's order on appeal. Acknowledging that courts have differed on what to do with funds in the Chapter 13 trustee's possession at the time of conversion, the district court found "more persuasive the reasoning of those courts . . . that have concluded that post-confirmation, pre-conversion funds in a trustee's possession should be returned to the debtor." Pet. App. 43a. The court held that returning the funds to the debtor furthered the salient congressional policy of "encouraging debtors to attempt a Chapter 13 bankruptcy—through which a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7—without penalty if that attempt fails." Pet. App. 43a. The court reasoned that Congress's preference for Chapter 13 filings would be undermined by distributing post-petition funds to creditors upon conversion from Chapter 13 to Chapter 7, as those same funds would be beyond the reach of creditors had the debtor merely filed a Chapter 7 petition from the beginning. Pet. App. 45a. The

court further concluded that "there is nothing unfair about returning those funds to a debtor rather than to his creditors," since "[b]y attempting a Chapter 13 bankruptcy, a debtor attempts to pay his creditors more than they would have received under a Chapter 7 liquidation," and thus when "a debtor exercises his right to convert to Chapter 7, 'no reason of policy suggests itself why creditors should not be put back in *precisely the same position* as they would have been had the debtor never sought to repay his debts by filing under Chapter 13.'" Pet. App. 46a (quoting *In re Hannan*, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982)) (emphasis added).

Viegelahn appealed the district court's decision, and the Court of Appeals for the Fifth Circuit reversed, holding that Harris's post-petition earnings were properly distributed to creditors. Pet. App. 3a. The court of appeals rejected Harris's argument that Viegelahn lacked the authority to disburse funds once the case was converted, holding that after conversion "a Chapter 13 trustee still has the duty to turn over to the Chapter 7 trustee any records and property of the estate in her possession or control, and to file a final report and account," and that therefore section 348(e)'s termination of the Chapter 13 trustee's "service" upon conversion should not be taken "too literally." Pet. App. 10a. Noting that Viegelahn retained the "power and duty to wrap up certain affairs of

the estate," the court saw "no reason why" this would not include "distributing the funds remaining in her possession" after conversion. Pet. App. at 14a.

Finding "little guidance in the Bankruptcy Code as to whether undistributed funds held by the Chapter 13 trustee at the time of conversion should be returned to the debtor or distributed to creditors," the court of appeals looked instead "to considerations of equity and policy." Pet. App. 22a. The court disagreed with the district court's reasoning that returning the funds to the debtor is necessary to promote Congress's intent to encourage Chapter 13 filings, believing it "unlikely that a debtor would be meaningfully deterred by the knowledge that payments made under a confirmed Chapter 13 plan will not be returned to him if he chooses to convert to Chapter 7," since the debtor is only required to make payments up until the time of conversion. Pet. App. 24a. The court explained that, "because the debtor can choose to convert to Chapter 7 at any time and thereby avoid making any further payments under the Chapter 13 plan, he retains the power to prevent any additional wages from going into the hands of creditors." Pet. App. 25a. The Fifth Circuit further held that "distribution of the funds to creditors is supported by strong considerations of fairness." Pet. App. 26a. Focusing on the benefits of a Chapter 13 filing to debtors, such as retention of property, and the disadvantages

suffered by creditors, such as depreciation in the value of property during the time it remains in the debtor's possession, the court concluded that "the creditors' claim to the undistributed funds is superior to that of the debtor." Pet. App. 27a-28a.

SUMMARY OF THE ARGUMENT

When Congress included the provisions of Chapter 13 as part of the Bankruptcy Reform Act of 1978, its intent was to encourage debtors to opt "to repay their debts over an extended period [under Chapter 13] rather than to opt for straight bankruptcy liquidation and discharge [under Chapter 7]." H.R. REP. 95-595, at 5 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 5966. To facilitate the Chapter 13 repayment process, Congress provided that the bankruptcy estate in a Chapter 13 case would differ markedly from an estate in Chapter 7. *See* Pet. App. 36a. In Chapter 7 cases, the estate generally consists of all of the debtor's nonexempt property as of the date the petition is filed, but notably does not include the debtor's post-petition earnings. 11 U.S.C. § 541(a). Thereafter, the Chapter 7 trustee typically liquidates the property of the estate, distributing the proceeds to creditors, while the debtor obtains a discharge of his debts. In combination, these elements of the Chapter 7 process reflect the essence of the Chapter 7 bargain: in exchange for surrendering all of his nonexempt

property to the Chapter 7 trustee for liquidation, the Chapter 7 debtor keeps his future earnings and otherwise receives a "fresh start" in the form of the discharge of prior indebtedness.

In contrast, a Chapter 13 estate includes property "that the debtor acquires after the commencement of the case." Pet. App. 36a (quoting 11 U.S.C. § 1306(a)). That is because, under Chapter 13, the debtor is required to propose a plan to repay his debts over a three- to five-year period, typically using his post-petition earnings to make the payments. Pet. App. 35a (citing 11 U.S.C. § 1322(d)); *see also* 11 U.S.C. § 109(e) (limiting Chapter 13 to individuals with regular income). The role of the Chapter 13 trustee is also quite different from that of the Chapter 7 trustee. The Chapter 13 trustee generally does not liquidate anything, but rather supervises the Chapter 13 process and serves as a disbursing agent for purposes of making distributions under the terms of the debtor's plan. In combination, these elements of the Chapter 13 process reflect the essence of the Chapter 13 bargain: in exchange for keeping his property, the Chapter 13 debtor agrees in his plan to surrender a portion of his future earnings for a period of years to be used to pay his debts and the debtor does not obtain a discharge until after substantial completion of his plan.

Congress's desire to promote Chapter 13 proceedings reflects its judgment that, in

general, a Chapter 13 debtor "will pay his creditors at least as much and likely more than he would have under Chapter 7." Pet. App. 43a. On the other hand, because the Chapter 13 process turns on the debtor's contribution of future earnings for an extended period, it is *strictly* voluntary in nature. Creditors may not force a debtor into Chapter 13 involuntarily. Nor may they keep the debtor in Chapter 13 against the debtor's will. On the contrary, a debtor has the right to dismiss a Chapter 13 case, or to convert a Chapter 13 case to one under Chapter 7, at any time. 11 U.S.C. § 1307(a).

After the enactment of the Bankruptcy Code, courts were divided on the issue whether post-petition property that becomes part of a Chapter 13 estate would be included in the Chapter 7 estate if the case were converted, even though the property would not have been part of the Chapter 7 estate had the case been filed originally under Chapter 7. Pet. App. 5a-6a; *compare In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991) *with In re Bobroff*, 766 F.2d 797, 803 (3d Cir. 1985). Congress addressed this conflict in 1994 by amending section 348 to state in amended form that, when a Chapter 13 case is converted to one under Chapter 7, "property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition*, that remains in the possession of or is under the control of the debtor on the date of conversion," provided that the debtor acts in

good faith. 11 U.S.C. § 348(f) (emphasis added). Congress explained that this clarification was intended to avoid the "serious disincentive to chapter 13 filings" that would occur if debtors risked losing property upon conversion that would have been safely outside the estate had they originally filed under Chapter 7. *See* H.R. REP. 103-835, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. In amending section 348, Congress also approved the reasoning of *In re Bobroff*, in which the Third Circuit held that post-petition property ceases to be part of the estate upon conversion because, when a debtor converts from Chapter 13 to Chapter 7, creditors should be put in "*precisely the same position* as they would have been had the debtor never sought to repay his debts." *In re Bobroff*, 766 F.2d at 803 (emphasis added). Courts have subsequently recognized an important corollary to this rule, namely that debtors should not be penalized for attempting a repayment plan under Chapter 13, and should, like creditors, be placed "'in the *same economic position* they would have occupied if they had filed chapter 7 originally.'" *In re Brinkley*, 323 B.R. 685, 691 (Bankr. W.D. Ark. 2005) (quoting *In re Fobber*, 256 B.R. 268, 277-78 (Bankr. E.D. Tenn. 2000)) (emphasis added).

The decision below stands in conflict with the principle embedded in section 348(f) that, after conversion of a bankruptcy case from Chapter 13 to Chapter 7, debtors and creditors

should be placed in the same economic position that they would have been in had the case been filed under Chapter 7 from the outset. If Harris had originally filed a Chapter 7 petition, any wages that he earned after the date of his bankruptcy filing would have been excluded from the bankruptcy estate and would have belonged exclusively to him. 11 U.S.C. § 541(a). Section 348(f) directs the same result following the conversion of his case from a proceeding under Chapter 13 with respect to undistributed funds on hand at the time of conversion.[2]

Harris's entitlement to his wages is also directed by the principle of voluntariness that undergirds the Chapter 13 process as a whole and, similarly, the anti-peonage value expressed in the Thirteenth Amendment. In crafting the provisions of Chapter 13, it was Congress's intent that "[i]nvoluntary chapter 13 cases are not permitted" because "chapter 13 only works when there is a willing debtor that wants to repay his creditors" and "[s]hort of involuntary servitude" it would be "difficult to keep a debtor

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[2] To be clear, Harris is not seeking the recovery of funds distributed to creditors under his Chapter 13 plan *prior* to the conversion of his case from Chapter 13 to Chapter 7. The analysis here, specifically application of the principle that, post-conversion, debtors and creditors should be put in the same position they would have occupied if the case had commenced initially under Chapter 7, involves the proper treatment of undistributed post-petition wages in the hands of the debtor or Chapter 13 trustee at the time of the conversion.

working for his creditors" when he is not willing to do so. H.R. REP. No. 95-595, at 322 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 6278; S. REP. No. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818. As this Court has explained, involuntary servitude for the purpose of satisfying a civil debt obligation is a constitutionally proscribed form of peonage: "a status or condition of compulsory service, based on indebtedness." *Clyatt v. United States*, 197 U.S. 207, 215 (1905). To avoid any possibility of servitude against the debtor's will, Congress has directed that Chapter 13 cases must be strictly voluntary. As is relevant here, treating the debtor's undistributed post-petition wages as belonging to his creditors even though he has exercised his statutory right to exit the Chapter 13 arena is fundamentally inconsistent with this principle. For these reasons, the decision of the court below should be reversed.

ARGUMENT

A. Congress's Intent In Enacting The Current Bankruptcy Code Was To Encourage Chapter 13 Filings.

By operation of law, the filing of a bankruptcy petition under Chapters 7, 11, 12, or 13 of the Bankruptcy Code creates a bankruptcy estate. 11 U.S.C. § 541(a). In a proceeding under Chapter 7, the estate consists of "all legal or equitable interests of the debtor in property *as*

of the commencement of the case." *Id.* § 541(a)(1) (emphasis added). Notably, the Chapter 7 estate does not include the debtor's post-petition wages. In every Chapter 7 case, a Chapter 7 trustee is appointed to supervise the case, liquidate the debtor's nonexempt assets, and distribute the proceeds to creditors. *Id.* §§ 701, 704, 726. With certain exceptions, the debtor's remaining debts are discharged to enable the debtor to make a "fresh start" free of any obligation to his former creditors. *See, e.g., Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364 (2006) (observing that, among the "[c]ritical features of every bankruptcy proceeding," there is "the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts").

In a Chapter 13 proceeding, however, the estate is constituted differently: as is relevant here, it specifically includes all property and earnings acquired by the debtor "after the commencement of the case . . . ." 11 U.S.C. § 1306. In addition, the process is radically different. Rather than surrender his assets and receive an immediate discharge, the debtor is required to propose a plan to repay his debts over a period of between three to five years, and creditors must receive at least as much as they would have received in a Chapter 7 liquidation. *Id.* §§ 1322(d), 1325(a)(4). Unlike in Chapter 7, the Chapter 13 debtor's post-petition earnings are used to fund the plan and pay creditors. In return, the debtor is able to maintain possession

of his assets while paying off his debts. Pet. App. 36a ("The Chapter 13 bankruptcy tends to be favored by debtors who have fallen behind on secured loan payments, such as mortgages and car loans, since it enables the debtor to maintain possession of the property while catching up on payments through a court-approved repayment plan."); *see also* H.R. REP. 95-595, at 118 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 6079 ("The benefit to the debtor of developing a plan of repayment under Chapter 13, rather than opting for liquidation under Chapter 7, is that it permits the debtor to protect his assets.").

By including Chapter 13 as part of the Bankruptcy Code, Congress made clear its intent to "encourage[] more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge." H.R. REP. 95-595 (1977), at 5, *reprinted in* 1978 U.S.S.C.A.N. 5963, 5966; *id.* at 6078 ("The premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used debtors should attempt repayment under Chapter 13. . ."). This preference reflects the congressional ambition that, under a Chapter 13 plan, "a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7." Pet. App. 43a. However, should the debtor be unable or unwilling to make the payments required under his Chapter 13 plan, section 1307 gives the debtor the right to convert to a Chapter

7 case at any time. 11 U.S.C. § 1307(a); H.R. REP. 95-595 (1977), at 428, *reprinted in* 1978 U.S.S.C.A.N. 5963, 6383. Importantly, conversion of a case "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." 11 U.S.C. § 348(a).[3] Rather, as section 348 makes plain, the Chapter 7 case is treated as though it had been commenced on the same date as the Chapter 13 proceeding. As amended in 1994, section 348 likewise treats the estate as though it had been constituted on the original filing date. As is relevant here, what this means is that, because a debtor's post-petition wages are not included in the Chapter 7 estate, undistributed earnings may not be used post-conversion to pay the claims of creditors, but rightfully belong to the debtor.

B. One Important Way That Section 348(f) Encourages Chapter 13 Filings Is By Ensuring That Debtors Are Not Penalized By Conversion From Chapter 13 To Chapter 7.

In the years immediately after the current Bankruptcy Code was enacted, courts were split on the issue whether post-petition property that had become part of a Chapter 13 estate should

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[3] The "order for relief" is the order commencing a bankruptcy case upon or following the filing of the petition. *See* 11 U.S.C. §§ 301(b), 303(h).

remain part of the estate after the case is converted to Chapter 7 if the property would not have been part of the estate had the case originally been filed as a liquidation proceeding. Pet. App. 5a-6a. The Third Circuit, for example held that a debtor's tort claims that accrued while a Chapter 13 proceeding was pending did not remain a part of the estate after conversion to Chapter 7. *In re Bobroff*, 766 F.2d 797, 803 (3d Cir. 1985). The court reasoned that "[t]his result is consonant with the Bankruptcy Code's goal of encouraging the use of debt repayment plans rather than liquidation," because "[i]f debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished." *Id.* If conversion does occur, the court held that "'no reason of policy suggests itself why the creditors should not be put back in *precisely the same position as they would have been had the debtor never sought to repay his debts. . . .*'" *Id.* (quoting *In re Hannan*, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982)) (emphasis added); *see also In re Boggs*, 137 B.R. 408, 410-11 (Bankr. W.D. Wash. 1992) (finding "no inherent inequity in refunding undisbursed wage contributions to debtors on conversion," and that "the Congressional policy of encouraging debtors to repay their creditors via Chapter 13 is

furthered by debtors (and their counsel) knowing they will not be penalized for attempting Chapter 13").

In contrast, the Seventh Circuit held that property inherited by the debtors after filing a Chapter 13 petition remained a part of the bankruptcy estate after the case was converted to Chapter 7, even though the property would not have been part of the estate had the debtor filed under Chapter 7 from the outset. *In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991). The debtors argued that section 348(a), which makes the filing date for a converted Chapter 7 case the date on which the original Chapter 13 petition was filed, required that property of their Chapter 7 estate be limited to property they owned when they initially filed their petition, excluding any property acquired during the Chapter 13 proceeding. *Id.* Acknowledging that this reading of section 348(a) was plausible, the court nonetheless held that "an equally good alternative from a purely semantic perspective is that conversion from Chapter 13 to Chapter 7 does not affect the bankrupt estate but merely assures the continuity of the case for purposes of filing fees, preferences, statutes of limitations, and so forth." *Id.* The court also rejected the policy argument that limiting property in a case converted from Chapter 13 to Chapter 7 to assets held by the debtor pre-petition encourages debtors to attempt to use Chapter 13, noting that "[the debtors'] position makes an *initial* filing

under Chapter 13 less risky, all right, but it also encourages conversions from Chapter 13 to Chapter 7." *Id.* The court concluded that "a rule of once in, always in is necessary to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors." *Id.*; *see also In re Calder*, 973 F.2d 862, 866 (10th Cir. 1992) ("[A]ll property in plaintiff's Chapter 13 estate—including any funds included pursuant to § 1306—are part of the postconversion Chapter 7 estate.").

Addressing this conflict, Congress amended section 348 to state that, when a Chapter 13 case is converted, "property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition*, that remains in the possession of or is under the control of the debtor on the date of conversion." 11 U.S.C. § 348(f)(1)(A); Pet. App. 6a-7a. An exception to this rule exists for cases that are converted in bad faith; in such cases "the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion." 11 U.S.C. § 348(f)(2).

As explained in the House Report accompanying this amendment, the intent behind it was to:

> clarify the Code to resolve a split in the case law about what property is

> in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 (and chapter 12), any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. . . . This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

H.R. REP. 103-835, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. The House Report further explained that, "to hold otherwise would create a serious disincentive to chapter 13 filings," as debtors would risk losing property upon conversion that would be safely outside the estate in Chapter 7. *Id.*

Following amendment of section 348, courts "uniformly agreed that Section 348(f)(1)(A) establishes that property acquired after the Chapter 13 filing and before discharge

under Chapter 7 is not part of the converted estate." *In re Stamm*, 222 F.3d 216, 218 (5th Cir. 2000). Moreover, courts widely accepted that the amendment "essentially codified the *Bobroff* rule." *In re Young*, 66 F.3d 376, 378 (1st Cir. 1995) (section 348(f)); *In re Sargente*, 202 B.R. 1023, 1025 (Bankr. S.D. Fla. 1996) (same). Thus, when a debtor converts from Chapter 13 to Chapter 7, creditors should be put in "*precisely the same position* as they would have been had the debtor never sought to repay his debts." *In re Bobroff*, 766 F.2d at 803 (emphasis added). Courts have likewise recognized that, upon conversion to Chapter 7, debtors should not be penalized for attempting a repayment under Chapter 13 and, like creditors, also should be placed "in the *same economic position* they would have occupied if they had filed chapter 7 originally.'" *In re Brinkley*, 323 B.R. 685, 691 (Bankr. W.D. Ark. 2005) (quoting *In re Fobber*, 256 B.R. 268, 277-78 (Bankr. E.D. Tenn. 2000)) (emphasis added); *see also In re Pearson*, 214 B.R. 156, 164 (Bankr. N.D. Ohio 1997) ("The general purpose of § 348(f) was to equalize the treatment a debtor would receive under a Chapter 13 case that converted to a Chapter 7 case with the treatment the debtor would receive if he filed a Chapter 7 originally.").

Because property that the debtor acquires after the filing of a Chapter 7 petition would not become part of the bankruptcy estate in such a proceeding, courts have held in many contexts

that such property acquired during the Chapter 13 proceedings properly belongs to the debtor following conversion, and neither creditors nor the Chapter 13 trustee have any right to it. *See, e.g.*, *Taylor v. Burns*, 344 B.R. 523, 525 (W.D. Ky. 2004) (tax refund relating solely to post-petition wages earned during Chapter 13 proceeding was not part of Chapter 7 estate after conversion and debtors were not obligated to turn the refund over to the Chapter 7 trustee); *Farmer v. Taco Bell Corp.*, 242 B.R. 435, 440 (W.D. Tenn. 1997) (debtor's tort claim "arose after confirmation of the Chapter 13 plan but prior to the conversion to a Chapter 7 bankruptcy," and absent a bad faith conversion belongs to the plaintiff, not the trustee); *In re Stillwaggon*, No. 10-bk-12289, 2014 WL 1087898, at *3 (Bankr. M.D. Fla. March 19, 2014) (inheritance received after Chapter 13 petition was filed was not part of Chapter 7 estate after conversion); *In re Morrison*, 403 B.R. 895, 904 (Bankr. M.D. Fla. 2009) (life insurance proceeds received by debtor after filing Chapter 13 petition were not part of the estate upon conversion to Chapter 7 and the debtor was not required to turn property over to trustee); *In re Brinkley*, 323 B.R. at 691 (same). Moreover, after conversion to Chapter 7, a debtor's "right to exemptions is determined by facts as they existed on the date of the original bankruptcy petition." *In re Sandoval*, 103 F.3d 20, 23 (5th Cir. 1997) (debtor's homestead exemption determined by living arrangements at

the time of filing, not the time of conversion; *see also In re Alexander*, 236 F.3d 431, 433 (8th Cir. 2001) (same). Notably, as detailed by Harris, courts have held that property acquired during Chapter 13 proceedings belongs to the debtor following conversion regardless of whether the post-petition property is in the hands of the debtor or the Chapter 13 trustee at the time of conversion. *See* Pet. for Writ of Cert. at 17 n.5. The rationale of the decisions cited above applies in this case, and consistent with Congress's intent in amending section 348, Harris's undistributed post-petition earnings in this matter properly belong to him.

C. The Decision Below Is In Direct Conflict With The Purpose Behind Section 348(f).

In this case, the Fifth Circuit properly acknowledged that, "[a]fter the passage of § 348(f), it is clear that property acquired after the filing of a Chapter 13 petition, including wages, does not become part of the Chapter 7 estate upon conversion (absent bad faith)." Pet. App. 9a. Nonetheless, the court concluded that, after conversion, the Chapter 13 trustee retains the "power and duty to wrap up certain affairs of the estate," and saw "no reason why" this should not include "distributing the funds remaining in her possession" after the debtor had converted the case. Pet. App. at 14a. Likewise, the Fifth Circuit properly acknowledged that Congress's

intent in enacting the Bankruptcy Code was to encourage "debtors to attempt repayment through Chapter 13 and remov[e] disincentives that would discourage this," Pet. App. 22a, but held nonetheless that it was "unlikely that a debtor would be meaningfully deterred by the knowledge that payments made under a confirmed Chapter 13 plan will not be returned to him if he chooses to convert to Chapter 7." Pet. App. 24a. This is so, the court stated, because distributing post-petition wages to creditors according to the Chapter 13 plan upon conversion, rather than returning the funds to the debtor, does not penalize the debtor for filing under Chapter 13 or discourage Chapter 13 filings because "'it simply requires [debtors] to fully honor their obligation under a confirmed plan up to the point when they voluntarily wish to terminate the provisions of the plan and have their case dismissed or converted to a Chapter 7 case.'" *Id.* (quoting *In re Bell*, 248 B.R. 236, 240 (Bankr. W.D.N.Y. 2000)).

Respectfully, the Fifth Circuit's judgment conflicts directly with the text and purpose of section 348(f), as recognized in the better reasoned decisions. In a nutshell, it conflicts with the principle embedded in section 348(f) that, following conversion, debtors and creditors should occupy the same economic position they would have occupied had the case been filed under Chapter 7 at the outset with respect to any undistributed funds. Once again, it is clear

that, had Harris initially filed a Chapter 7 petition rather than a Chapter 13 petition, any wages earned after the date of filing would be excluded from the Chapter 7 bankruptcy estate and would belong to him. 11 U.S.C. § 541(a). Under the directive of section 348(f), Harris's undistributed wages also should be his following the conversion of his case. By approving the post-conversion distribution of Harris's post-petition wages to his creditors, the Fifth Circuit has improved the creditors' position at Harris's expense contrary to the text and purpose of the relevant provisions of the Code. Whatever administrative duties Viegelahn may have had following Harris's conversion, they cannot include the authority to distribute funds under a defunct Chapter 13 plan in contravention of the statutory scheme Congress has prescribed.

D. The Decision Below Conflicts With the Principle that Chapter 13 Proceedings Are Strictly Voluntary.

The Thirteenth Amendment commands that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . ." U.S. CONST. amend. XIII, § 1. As noted in *The Civil Rights Cases*, the Amendment is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States," 109 U.S. 3, 28 (1883), and by its terms bars

"peonage," defined as "a status or condition of compulsory service, based on indebtedness." *Clyatt v. United States*, 197 U.S. 207, 215 (1905). As the Court has explained, the Amendment "is a charter of universal civil freedom for all persons" with the ambition "to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." *Bailey v. Alabama*, 219 U.S. 219, 241 (1911).

Reflecting a similar set of principles, both the House and Senate Reports accompanying the Bankruptcy Code explain that "[i]nvoluntary chapter 13 cases are not permitted" because "chapter 13 only works when there is a willing debtor that wants to repay his creditors" and "[s]hort of involuntary servitude" it would be "difficult to keep a debtor working for his creditors" when he is not willing to do so. H.R. REP. No. 95-595, at 322 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 6278; S. REP. No. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818. While forcing a debtor against his will to contribute his post-petition wages to a particular bankruptcy procedure for the sake of paying his debts may not be precisely the same thing as peonage *per se*, the two are at least closely aligned. Both involve the dramatic stripping of the debtor's personal agency. Under a coercive bankruptcy procedure in which the debtor is

forced to contribute his post-petition earnings to the process (as opposed to his compelled labor), it is true that the debtor might elect to forego working altogether, and thus avoid the contribution of his wages in this way. But by the same token, the debtor would also typically lack the ability to support himself, and thus be forced to work. In practical terms, the difference between the two forms of compulsion is therefore likely to be largely illusory. In any event, regardless of whatever formal differences exist between peonage and a bankruptcy procedure that compels the involuntary contribution of a debtor's post-petition earnings, Congress has elected to avoid even the semblance of involuntary servitude by rendering the Chapter 13 process strictly voluntary.

Consistent with this congressional choice, the debtor's obligation in Chapter 13 to contribute his post-petition wages to the repayment of his debts goes hand in hand with his intention to voluntarily submit to the Chapter 13 process. When the debtor has formally indicated his inability or unwillingness to continue with that process, and has exercised his right to convert his case to a proceeding under Chapter 7, his obligation to contribute his post-petition wages rightfully comes to an end. At that point, his undistributed wages are properly his and may not be distributed to his creditors, and certainly not by a statutorily

disenfranchised Chapter 13 trustee under the terms of a defunct Chapter 13 plan.

CONCLUSION

For the foregoing reasons, as well as those briefed by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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No. 14-400

In The
Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, Chapter 13 Trustee,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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Freeman v. Schulman (*In re Freeman*), 86 F.3d 478 (6th Cir. 1996) 29

Hagel v. Drummond (*In re Hagel*), 184 B.R. 793 (B.A.P. 9th Cir. 1995) 29

In re Bell, 248 B.R. 236 (Bankr. W.D.N.Y. 2000) 18

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In re Hardin, 200 B.R. 312 (Bankr. E.D. Ky. 1996) 26

In re Hufford, 460 B.R. 172 (Bankr. N.D. Ohio 2011) 33

In re Inyamah, 378 B.R. 183 (Bankr. S.D. Ohio 2007) 15

In re Lennon, 65 B.R. 130 (Bankr. N.D. Ga. 1986) 25

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In re Pegues, 266 B.R. 328 (Bankr. D. Md. 2001) 26

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Waugh v. Saldamarco (*In re Waugh*), 82 B.R. 394 (Bankr. W.D. Pa. 1988) 9, 15, 26

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OTHER AUTHORITIES

H.R. Rep. No. 103-835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340 30

Bryan A. Garner, *Garner's Modern American Usage* (3d ed. 2009) 10

Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* (4th ed.) 17, 19, 20, 29

Amber J. Moren, *The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594 (2013) 19

INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the chapter 13 standing trustees in the United States are voting members of the NACTT. Robert B. Wilson, a Chapter 13 Standing Trustee for the Northern District of Texas and current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee, to

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[1] Both the petitioner and the respondent have consented to the filing of this brief. Copies of the parties' letters consenting to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part and neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief. The respondent, as a member of the NACTT, pays general dues to the organization but has not provided any direct monetary contribution to support the preparation or submission of this brief.

prepare and submit this *amicus curiae* brief on the NACTT's behalf.

Historically, Congress and federal courts have observed that the more efficient and effective chapter 13 programs are those conducted by chapter 13 standing trustees who exercise a broad range of responsibilities in both the design and effectuation of chapter 13 plans. *See Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every chapter 13 plan. *See* 11 U.S.C. § 1302. A chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences and fraudulent transfers, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Company*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors collectively by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in title 11 of the United States Code (the "Bankruptcy Code"). *Maddox*, 15 F.3d at 1355.

The NACTT's perspective is important, as the direct holding in this case will affect the practice of

every chapter 13 trustee. The NACTT's members also have the expertise to offer meaningful assistance in presenting the issues to the Court. They specialize in this area and their experience gives the organization particular insight into the practical issues the case presents.

SUMMARY OF THE ARGUMENT

The Bankruptcy Code provides direct guidance on the issue presented by this case. Section 1326 governs chapter 13 plan payments. The first paragraph of that section sets out the requirement that the debtor commence making payments under the plan to the trustee. 11 U.S.C. § 1326(a)(1)(A). The second paragraph instructs trustees regarding the disposition of plan payments and includes the following two sentences: "A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee *shall* distribute *any such payment* in accordance with the plan as soon as is practicable." 11 U.S.C. § 1326(a)(2) (emphasis added). The phrase "any such payment" in the second sentence is open to two interpretations. It might, as some courts have held, refer back to any payment retained by the trustee pursuant to the first sentence, making it a reference only to pre-confirmation payments. But this interpretation would leave a gap. The statute would provide specific guidance regarding pre-confirmation payments, but none regarding post-confirmation

payments. The phrase "any such payment," however, might also refer back to the *kind* of payment that the first sentence concerns – payments under the plan, as required by § 1326(a)(1)(A). The context supports this interpretation, as it leaves no statutory gap, and as the resulting mandate is exactly what one would expect. It gives trustees the same instruction for post-confirmation plan payments as for pre-confirmation plan payments when the court has confirmed a plan – to disburse the funds in accordance with the confirmed plan.

Even if § 1326 did not provide this mandate, the nature of the chapter 13 process would dictate the same result. Confirmation of a plan is a dividing line in a chapter 13 case. The statute provides some breathing room to debtors seeking confirmation, directing trustees to return plan payments to debtors if the court does not confirm a plan, subject to some exceptions. *See* 11 U.S.C. § 1326(a)(2). But the confirmation of a plan makes the plan binding on debtors and creditors, *see* 11 U.S.C. § 1327(a), and permits the fixing of rights under the plan.

Plainly, rights with regard to chapter 13 plan payments can become fixed *during* the chapter 13 case. The petitioner does not take a contrary position. He recognizes that creditors' rights vest during the case, but he argues that the vesting occurs only when the trustee has actually distributed funds. The nature of the chapter 13 arrangement, however, suggests that the *debtor's* rights to plan payments under a confirmed chapter 13 plan terminate in favor of the

creditors under the plan upon submission of the payments to the trustee even if creditors' rights do not vest until distribution. Multiple aspects of the chapter 13 process support this conclusion.

First, when a case involves a confirmed plan, the debtor's submission of plan payments represents the fulfillment of a binding obligation. A debtor's decision to proceed with a confirmed chapter 13 plan is voluntary, but the debtor's obligations while the plan is in effect are not. The debtor has the power to terminate a plan at virtually any time, but the termination only has a prospective effect with regard to the debtor's payment obligations. An attempt to recapture payments already due and made to the trustee under a confirmed plan denies the binding effect the plan had at the time the payments were made.

Second, chapter 13 plan payments are the price of relief under chapter 13. The relief available under chapter 13 differs from the relief available under chapter 7. Debtors realize some of the benefits immediately, such as the extended protection under the automatic stay and the ability to retain property of the estate that would be lost in a chapter 7. The plan, of course, also involves other relief, like the discharge, that debtors do not realize immediately. But the plan payments are not refundable merely because they go toward both present and future relief. The debtor bears the burden, with each plan payment, of determining whether the benefits of the plan – immediate and potential – justify continuing with the plan and incurring the cost.

Many of the benefits a debtor realizes during a chapter 13 case come at the expense of creditors bound by the confirmed plan, and the conversion of the debtor's case does not generally reverse these costs. The distributions under the plan provide the only compensation the creditors receive for these costs. The petitioner significantly overstates the degree to which distributions under a chapter 13 plan benefit creditors in relation to chapter 7. Though debtors generally fund chapter 13 plans from post-petition income that would not be included in a chapter 7 estate, the distributions also purchase rights that the chapter 7 case does not provide. For example, secured creditors often receive distributions in chapter 13 cases that they would not receive from a chapter 7 case, but the creditors' liens also survive the chapter 7 case. For a debtor to retain collateral after a chapter 7 case in the same way the debtor retains collateral during a chapter 13 case, the debtor would have to make payments from non-estate funds. For some debtors, moreover, the comparison to chapter 7 is simply inapposite because the chapter 7 means test would preclude a chapter 7 case. *See* 11 U.S.C. § 707(b).

Third, debtors relinquish their claim to funds by remitting them to the chapter 13 trustee. The sole purpose of remitting payments to the trustee is to convey funds to creditors. *See* 11 U.S.C. § 1322(a)(1). The delay between the trustee's receipt of plan payments and the disbursement of funds to creditors is

not related to the debtor's retention of any rights to the funds.

The petitioner argues that § 348(f) controls the disposition of undisbursed plan payments upon conversion because, absent bad faith, it excludes post-petition income from the property of the estate in the converted chapter 7 case. But the basis for distributing funds held by a chapter 13 trustee to creditors under a confirmed plan is not that the funds are included in the chapter 7 estate. It is not even that the funds are or were property of the chapter 13 estate. *See* 11 U.S.C. § 1322(b)(8) (permitting a plan to provide for payment of "all or any part of a claim . . . from property of the estate *or property of the debtor*" (emphasis added)). Rather, the basis for distributing funds to creditors is that the confirmed plan established rights with respect to the funds prior to the conversion.

The respondent's position does not conflict with the general congressional support for chapter 13. Congress favors chapter 13 because it promises better results for both debtors *and creditors*. Even if a policy of returning funds to debtors upon conversion would encourage chapter 13 filings, it would not serve the congressional policy if it did so only by favoring debtors over creditors. Further, the respondent's position far from eliminates the incentives to file chapter 13 over chapter 7. These incentives include a broader discharge under chapter 13, a right to the return of plan payments when a plan is not confirmed, and the possibility of subjecting post-petition claims to

discharge in a conversion to chapter 7 without submitting post-petition assets to the chapter 7 estate.

The rights with respect to chapter 13 plan payments derive from the confirmed plan, so the confirmed plan should control the disposition of the funds, not because the plan remains effective after conversion but rather because the effectiveness it had prior to the conversion is not undone by the conversion. The Fifth Circuit held that payments under a confirmed plan do not give creditors any "vested rights to payment" but, based on considerations of policy and equity, concluded that creditors have a claim to funds that is superior to that of the debtor. Pet. App. 22a-28a. Though the court's opinion suggests that the confirmed plan would control the distributions to creditors, the holding is stated in terms of relative rights between creditors and debtors. The NACTT urges this Court to affirm the Fifth Circuit's holding that creditors have a superior claim to undistributed plan payments under a confirmed chapter 13 plan but also to make clear that the confirmed plan guides the distribution of the funds.

ARGUMENT

I. Section 1326(a)(2) directs a chapter 13 trustee to disburse plan payments in accordance with a confirmed plan

Section 1326(a)(2) provides direct statutory guidance regarding the disposition of plan payments

made to a chapter 13 trustee. It controls the disposition of funds even if a case is converted or dismissed before the trustee actually disburses the funds. *See, e.g.*, *In re Michael*, 699 F.3d 305, 314 n.7 (3d Cir. 2012) ("[I]f a Chapter 13 proceeding is converted pre-confirmation administrative expense claims will be paid from undistributed plan payments. . . ."); *In re Parrish*, 275 B.R. 424, 430 (Bankr. D.D.C. 2002) ("[T]he chapter 13 trustee disburses to creditors in accordance with the confirmed plan any undisbursed plan funds held at the moment of either a dismissal or a conversion."); *Waugh v. Saldamarco* (*In re Waugh*), 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988) ("The word 'shall' in section 1326(a)(2) creates the condition of a trust. Creditors have a right to the funds in an active confirmed chapter 13 plan upon payment by the debtor.").

Section 1326(a)(2) reads as follows:

> A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

11 U.S.C. § 1326(a)(2). Some courts, including the Fifth Circuit below, read the phrase "any such payment" in

the second sentence as a reference to any payments retained by a trustee pursuant to the instruction in the first sentence, making it a reference only to pre-confirmation plan payments. *See, e.g.*, *Williams v. Marshall* (*In re Williams*), 488 B.R. 380, 385 (Bankr. N.D. Ill. 2013); *see also* Pet App. 15a; Pet. Br. 33 n.8 (compiling cases). This interpretation, however, is not the only possibility. The phrase, instead, might serve as a reference back to the *kind* of payment that the first sentence concerns. *See* Bryan A. Garner, *Garner's Modern American Usage* 783 (3d ed. 2009) ("[*S*]*uch* means 'of that kind'. . . . It isn't properly equivalent to *this*, *that*, *these*, or *those*."). The subject of the passive-voice first sentence is "a payment under paragraph (1)(A)" – that is, a payment under the plan. Under this interpretation, the phrase "any such payment" functions as a reference to plan payments generally, and the three sentences in § 1326(a)(2) represent a succeeding set of instructions with regard to plan payments: The first sentence says plan payments shall be retained by the trustee until confirmation or denial of confirmation. The second sentence says that *any* plan payment (whether pre-confirmation or post-confirmation) shall be distributed in accordance with the plan if a plan is confirmed. The third sentence says plan payments shall be returned to the debtor, with specified exceptions, if a plan is not confirmed.

The broader context supports this interpretation. The contrary interpretation is certainly possible as a matter of grammar and usage, but it leaves a glaring

gap in the statute. Under that interpretation, the Code would provide specific guidance regarding the disposition of pre-confirmation payments, but it would provide no guidance regarding post-confirmation payments. The interpretation advanced here fills that gap with an entirely predictable instruction for the disposition of post-confirmation plan payments, the same instruction the Code gives for the disposition of pre-confirmation plan payments under a confirmed plan.

The petitioner contends that § 1326 is inapplicable upon conversion because § 103(i) specifies that chapter 13 applies only in cases under that chapter. This exceedingly literal application of § 103(i) is not consistent with § 1326. Section 1326, for example, instructs chapter 13 trustees to make disbursements on administrative claims (claims under § 503(b)) if the court denies confirmation. Under the petitioner's interpretation, chapter 13 trustees would not have the authority to make these disbursements in cases that convert to another chapter. This result would create an inexplicable disparity between cases that are converted and cases that are dismissed prior to confirmation. The petitioner's interpretation also would invalidate the provision of § 1326 that instructs the chapter 13 trustee to return funds to the debtor. The better view is that § 1326 governs because it was effective at the time the trustee received the funds – that rights with regard to the plan payments become fixed pursuant to chapter 13 prior to conversion to another chapter.

The petitioner's argument that § 348(e) eliminates the chapter 13 trustee's role upon conversion suffers from a similar flaw. The trustee's duty to return funds to a debtor in a case that is converted pre-confirmation is a duty as trustee, not just as a private individual who finds himself or herself in possession of the debtor's property. *See Parrish*, 275 B.R. at 431 ("[Section] 348, in terminating the chapter 13 trustee's services so that she does not continue to serve as a trustee administering the chapter 7 estate, does not relieve the chapter 13 trustee of her duty that existed preconversion to make distribution as commanded by § 1326(a)(2)."). For example, a loss of funds held by a trustee after a conversion from chapter 13 presumably would implicate the bond the trustee was required to file with the court "conditioned on the faithful performance of [the trustee's] official duties." 11 U.S.C. § 322(a).

II. Creditors have rights to funds remitted to the trustee under a confirmed chapter 13 plan that are superior to the debtor's rights upon conversion to chapter 7

Even if § 1326(a)(2) were not controlling, the nature of the chapter 13 process would dictate that creditors have rights to funds remitted to the trustee under a confirmed chapter 13 plan that are superior to the debtor's rights upon conversion to chapter 7. Section 348 does not demand a different result.

A. The debtor's submission of plan payments to the trustee under a confirmed chapter 13 plan fulfills a binding obligation

A debtor's principal obligation under a chapter 13 plan is to make the payments required by the plan, and the plan payments are the price the debtor pays to proceed under chapter 13. Prior to confirmation, § 1326 makes these payments partially contingent by providing for the return of funds if a plan is not confirmed. *See* 11 U.S.C. § 1326(a)(2). But confirmation formalizes the plan and makes its set of rights and responsibilities fully binding on debtors and creditors alike. *See* 11 U.S.C. § 1327(a). It becomes a "legislatively sanctioned, and judicially approved new series of rights and responsibilities among the debtor and the debtor's creditors." *Ledford v. Burns* (*Matter of Burns*), 90 B.R. 301, 304 (Bankr. S.D. Ohio 1988). The confirmed plan provides the path to an eventual discharge (when the debtor is eligible for a discharge), but it also establishes interim rights and responsibilities that may become fixed during the chapter 13 case. When the court confirms a plan, the debtor's submission of payments required by the plan represents the fulfillment of a binding obligation, and nothing suggests that the payments are refundable.

The petitioner seeks to extend the pre-confirmation treatment of plan payments past the dividing line of confirmation. He argues that post-conversion distributions to creditors "penalize" the debtor because payments distributed after a conversion no longer

apply toward the goal of a chapter 13 discharge. Even if the implied premise of this argument – that debtors receive no meaningful benefit from an aborted chapter 13 case – were correct, it ignores the debtor's binding obligations under the plan. The petitioner's argument, moreover, would apply to *all* payments under a chapter 13 plan, including payments that a trustee has disbursed to creditors pre-conversion. If, as the petitioner suggests, Congress intended to permit good-faith debtors to retroactively select chapter 7 without "penalty" – obtaining the exact result they would have obtained if they had initially filed under chapter 7 – then debtors in converted cases would be entitled to a return of the payments distributed to creditors pre-conversion. *See Mehan v. Sparkman* (*In re Mehan*), Nos. 96-11385 DWS, 00-0002, 2000 WL 1010577, at *4 (Bankr. E.D. Pa. July 19, 2000); *cf. In re Parrish*, 275 B.R. 424, 433 (Bankr. D.D.C. 2002) (responding to a similar argument regarding the effect of dismissal). This result would be entirely unworkable and unfair to creditors that were subject to the restrictions of an active chapter 13 plan prior to the conversion.

Plainly, rights with regard to chapter 13 plan payments can become fixed *during* the chapter 13 case. The petitioner does not dispute this conclusion, despite his view that the post-conversion distribution of funds represents a penalty. He only disputes the timing. He addresses the issue in terms of the vesting of creditors' interests, and he contends that this vesting occurs only when the trustee distributes the

funds. Pet. Br. 33. He cites no statutory provision that directly controls this timing, however, and other than § 1326(a)(2)[2] the statute does not expressly provide *at all* for either the termination of a debtor's interests in plan payments or the vesting of creditors rights to funds. Clearly, however, rights to plan funds become fixed as a confirmed chapter 13 plan proceeds. Some courts hold that that creditors' rights "vest" upon receipt of funds by a chapter 13 trustee. *See* Resp. Br. 23 n.4 (compiling cases). But the Court of Appeals below correctly concluded that the creditors need not hold "vested rights" to funds in order to have claims to the funds that are superior to the debtor's. *See* Pet App. 28a. The NACTT submits that, in general, a *debtor's* rights to plan payments terminate when the debtor relinquishes funds to the trustee under a confirmed plan. *See, e.g.*, *In re Radenbaugh*, 125 B.R. 797, 798 (Bankr. W.D. Mo. 1991) ("The payment of the money to the Chapter 13 Trustee once the plan is confirmed is equivalent to paying the money to the creditors."); *Waugh v. Saldamarco* (*In re Waugh*), 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988) (holding that property a trustee

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[2] Even if § 1326(a)(2) governed only pre-confirmation payments, it would demonstrate the possibility of rights to plan payments becoming fixed prior to the actual distribution of the funds to creditors. The provision contains language directing a trustee to disburse funds to creditors, and numerous courts have held that these instructions control the disposition of funds even after conversion or dismissal. *See, e.g.*, *In re Michael*, 699 F.3d 305, 314 n.7 (3d Cir. 2012); *In re Inyamah*, 378 B.R. 183, 185 (Bankr. S.D. Ohio 2007).

receives under a confirmed plan constitutes a "trust for beneficiaries of the plan"). The nature of the chapter 13 system and the details of the chapter 13 payment process support this conclusion.

B. Plan payments purchase the bankruptcy relief afforded under chapter 13

The plan payments under a confirmed chapter 13 plan purchase the relief the case affords, and much of the relief comes at the expense of creditors. Permitting debtors to reclaim payments submitted under a confirmed plan would be anomalous, as the debtor has already enjoyed the relief the payments purchase and the payments were already due.[3] From the debtor's perspective, moreover, the payment process is complete once the debtor has submitted the payment to the trustee.

Some of the benefits of a chapter 13 case – most notably, the discharge – do not accrue immediately. But the potential nature of these benefits does not make the debtor's obligations contingent. The Bankruptcy Code makes no guarantee that plan payments toward a potential benefit under a confirmed chapter 13 plan are risk-free. Doing so would shift risks to creditors. For example, a debtor might elect chapter

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[3] The timing of payments under § 1326 suggests that plan payments generally apply retrospectively. Section 1326(a)(1) does not require a debtor to commence plan payments until 30 days after the petition date. *See* 11 U.S.C. § 1326(a)(1).

13 because it allows the debtor to retain a vehicle that secures a debt (and even modify the terms of the debt). *See generally* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 104.1 (4th ed., sec. rev. Jan. 5, 2011), www.Ch13online.com (describing the power to modify secured claims). If the vehicle breaks down during the plan, the plan may no longer hold any advantage over a chapter 7 case for the debtor. The debtor in that situation would be free to terminate the *future* obligations under the plan by converting or dismissing the case, but nothing in the Code suggests that the debtor has the power to retroactively rescind payments submitted prior to the termination.

The petitioner argues that he is entitled to reclaim payments remitted under a binding plan because chapter 13 is voluntary and because subsequent events revealed that the potential benefits of the plan "evaporated." Pet. Br. 45. But because the plan payments represent the fulfillment of binding obligations, the debtor's subsequent determination that the plan is not beneficial does not undo the prior payments. The petitioner's argument is akin to an argument by a purchaser of life insurance that the insurer should refund the policy premium because the insured made no claim on the policy and the benefits of the policy never materialized. The effectiveness of payments made under a confirmed chapter 13 plan stems from the binding effect of the plan at the time the debtor remitted the payments, not from an

after-the-fact determination of the actual benefits the debtor realized.

The very voluntariness of chapter 13 highlighted by the petitioner supports upholding the effectiveness of payments debtors voluntarily remit in order to proceed under chapter 13. *See In re Bell*, 248 B.R. 236, 239-40 (Bankr. W.D.N.Y. 2000) ("Although Chapter 13 is a voluntary proceeding, just because debtors at some point post-confirmation voluntariiy change their intent and elect to proceed in Chapter 7 rather than in Chapter 13, that election does not retroactively revoke the intent they had at the time when they were operating under a confirmed plan and voluntarily chose to make the required plan payments to enable them to continue to enjoy the ongoing benefits of that plan." (footnote omitted)). A debtor has the ability to terminate future obligations under a plan almost immediately. *See* Fed. R. Bankr. P. 1017(f) ("A . . . chapter 13 case shall be converted without court order when the debtors files a notice of conversion."); *see also* 11 U.S.C. § 1307(a), (b). The debtor's voluntary decision to pay the price of continuing with a confirmed plan is binding in large part because the debtor had the choice not to do so.

The petitioner also virtually ignores the tangible benefits chapter 13 debtors receive during the chapter 13 case, more or less contemporaneously with the plan payments:

- A chapter 13 case generally[4] provides an extended period of protection from creditors under the automatic stay. *See generally* Lundin & Brown, *supra,* §§ 68.2, 207.1.
- Chapter 13 also stays creditor actions against codebtors. *See* 11 U.S.C. § 1301.
- A chapter 13 case permits debtors to retain property that might otherwise be subject to liquidation or repossession if the debtor were to proceed under chapter 7.[5]

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[4] In some repeat filings, the Code provides for automatic termination of the stay. 11 U.S.C. § 362(c)(3), (4). Creditors also may seek relief from the automatic stay. 11 U.S.C. § 362(d).

[5] Chapter 13 allows debtors to restructure many secured debts, adjusting interest rates, extending payment schedules, and, in some circumstances, even paying less than the prepetition claim amount. In a chapter 7 case, debtors have more limited options for retaining collateral that secures a claim. They may reaffirm a secured debt but doing so requires the debtor to obtain court approval for a new agreement and to make payments under the agreement to avoid repossession or foreclosure. *See* 11 U.S.C. § 524(c). In some instances, a debtor also has the option of "redeeming" personal property that serves as collateral for a secured claim by paying the holder only the value of the creditor's interest in the collateral. This option, however, requires the debtor to pay the creditor this amount in full at the time of the redemption. *See* 11 U.S.C. § 722. Non-statutory options may also permit debtors to retain collateral, but they likewise require the debtor to make payments on terms that are likely to be less favorable than under chapter 13. *See* Amber J. Moren, *The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594, 1614-17 (2013) (describing "forbearance on repossession" and "backdoor ride-through").

- A chapter 13 case allows debtors to cure defaults and maintain regular payments on long-term secured claims such as mortgages. 11 U.S.C. § 1322(b)(5). This power is not tied to the discharge of the debt or completion of payments under the plan. *See* 11 U.S.C. §§ 348(f)(1)(C)(ii) (referring to the possibility of "fully cur[ing]" a prebankruptcy default prior to conversion), 1328(a)(1) (excluding debts provided for under § 1322(b)(5) from discharge). The petitioner's implied theory of conversion – that the chapter 13 plan is effectively annulled and that § 103(i) makes chapter 13 irrelevant upon conversion to another chapter – would deny this effect.

- A chapter 13 debtor has the ability to pay an attorney through the chapter 13 plan. *See* 11 U.S.C. § 330(a)(4)(B). In a chapter 7 case, a debtor's attorney is more likely to demand payment up front, as the statute does not provide for payment of fees for representing the debtor from the chapter 7 estate. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *see also Berliner v. Pappalardo* (*In re Puffer*), 674 F.3d 78, 84-85 (5th Cir. 2012) (Lipez, J., concurring) (describing the "*Lamie* problem").

- Chapter 13 permits debtors to manage nondischargeable debts. *See* Lundin & Brown, *supra*, § 4.5, at ¶ 5. This benefit of chapter 13 is, by definition, not

dependent upon an eventual discharge of the debt.

- Chapter 13 permits debtors to manage debts during a period that the debtor is ineligible for a discharge under chapter 7. *See* 11 U.S.C. §§ 727(a)(8), (9). Some debtors, moreover, proceed under chapter 13 even when they will not receive a discharge in the chapter 13 case. *See, e.g.*, *Baxter v. Lewis* (*In re Lewis*), 339 B.R. 814, 817 (Bankr. S.D. Ga. 2006). The fact that debtors elect to do so is virtually irrefutable evidence that debtors perceive benefits from chapter 13 that are not dependent upon a discharge.

The NACTT questions the petitioner's suggestion that "[c]reditors are virtually always better off if a debtor first attempts to proceed under Chapter 13." Pet. Br. 46. The principal benefits that accrue to chapter 13 debtors come at the expense of creditors, and the costs to creditors of the immediately realized benefits are not generally reversed by a conversion to chapter 7. The extended automatic stay prevents creditors from taking actions they would otherwise be entitled to take. They have no power to go back in time and take the actions that the stay precluded. Similarly, secured creditors in a case that converts to chapter 7 receive nothing to compensate for any reduction in their security due to the debtor's retention and use of the collateral. The only protection these creditors have comes from the distributions in the chapter 13 case. *See In re Rutenbeck*, 78 B.R. 912, 913

(Bankr. E.D. Wis. 1987) (noting the unfairness of denying funds to "secured creditors who have been promised these funds and who have relied on them for the protection afforded . . . under § 361(1) of the Code"). Even creditors that chapter 13 ostensibly compensates for the delays in distributions under chapter 13 relative to chapter 7 may come up short in a conversion. A chapter 13 plan must provide for creditors to receive the present value of the amount they would receive in a liquidation under chapter 7, *see* 11 U.S.C. § 1325(a)(4), but the Code does not directly require debtors to pay interest on these claims as it accrues. In many cases, the plan pays other claims first. *See, e.g.*, *In re Redick*, 81 B.R. 881, 885 (Bankr. E.D. Mich. 1987) ("We can take notice that there are occasions where a Chapter 13 case proceeds for some time without any payments being made to general unsecured creditors."). The accumulated interest due to these creditors evaporates if the case converts to chapter 7. The creditors receive, at best, what they would have received if the case had begun under chapter 7, with no compensation for the delay.

The petitioner argues that, because the money that funds a chapter 13 plan is generally post-petition income that would not have been included in the chapter 7 estate if the debtor had filed under chapter 7, the chapter 13 payments made prior to a conversion represent a windfall to creditors. The argument misrepresents the nature of a chapter 13 plan in relation to a liquidation under chapter 7. Secured creditors do not receive distributions from property of

the estate in a chapter 7 case,[6] *see* 11 U.S.C. § 726, but the creditors' liens generally survive the chapter 7 discharge, *see Dewsnup v. Timm*, 502 U.S. 410, 418-19 (1992), meaning that debtors wishing to retain collateral after a chapter 7 case must make payments to secured creditors in some form.[7] Chapter 13 plans, in contrast, frequently provide for payments on secured claims. In fact, payments on secured claims often represent a large portion of the distributions under a chapter 13 plan, especially distributions early in the plan. The distributions to secured creditors under chapter 13 plans do not necessarily (or even generally) represent a windfall relative to what the creditors would have received if the debtor had filed under chapter 7.

The suggestion that payments under a chapter 13 plan represent a windfall to creditors also ignores the fact that a chapter 7 case is not a viable alternative for all debtors. The amendments to the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 introduced a means test into individual chapter 7 cases designed to deny chapter 7 relief to debtors with a reasonable ability to pay a significant amount to creditors outside of

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[6] If a trustee obtains authority to sell property free and clear of liens, *see* 11 U.S.C. § 363(f), the trustee might make distributions from the sale proceeds on account of a lien, especially if the authority to sell free and clear of the lien derived from § 363(f)(3).

[7] *See supra* note 5.

chapter 7. *See* 11 U.S.C. § 707(b). By closing off the chapter 7 option, means testing encourages debtors to repay creditors through chapter 13 plans. It is unclear from the record whether means testing was a factor in the petitioner's decision to proceed under chapter 13, but the fact that the debtor proposed to pay unsecured creditors in full over 60 months suggests that it was. *See* 11 U.S.C. § 1325(b)(4) (establishing an applicable commitment period of 5 years if a debtor is above the applicable median family income). Chapter 13 involves a complementary "best efforts" test that requires debtors to commit all "projected disposable income" to the plan.[8] *See* 11 U.S.C. § 1325(b)(1)(B). For debtors pushed into chapter 13 by the means test, the chapter 13 plan payments clearly represent the price Congress intended the debtors to pay to obtain bankruptcy relief. If such a debtor experiences a reduction in income during a chapter 13 case, the debtor might be able to convert to chapter 7 and rebut the presumption of abuse under the chapter 7 means test by showing a reduction in income. *See* 11 U.S.C. § 707(b)(2)(B) (permitting rebuttal by demonstrating "special circumstances"). But the subsequent reduction in income would not affect the past ability to pay or the resulting amount

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[8] For above-median-income debtors, the link to the chapter 7 means test is especially clear, as the projected-disposable-income test for these debtors directly incorporates elements of the chapter 7 means test. *See* 11 U.S.C. § 1325(b)(3).

that Congress clearly believed the debtor should have been paying.

C. Debtors relinquish funds to creditors under a confirmed chapter 13 plan when they remit plan payments to the trustee

The details of the chapter 13 payment process add further support to the conclusion that a debtor's rights to payments under a confirmed chapter 13 plan terminate at the point the debtor makes the payments to the chapter 13 trustee. The trustee in a chapter 13 case (upon confirmation) is essentially a conduit for payments to creditors. The sole purpose of remitting plan payments to the trustee is to convey funds to creditors in accordance with the plan. *See* 11 U.S.C. § 1322(a)(1) (requiring a chapter 13 plan to "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary *for the execution of the plan*" (emphasis added)). At the point the debtor has made a payment to the trustee, the debtor has relinquished the debtor's claim to the funds and has nothing further to do to complete the payment. *See, e.g.*, *In re Lennon*, 65 B.R. 130, 136 (Bankr. N.D. Ga. 1986) ("[T]he debtor's right of possession [under § 1306(b)] and vesting of title [under § 1307(c)] is limited to all sums and property not otherwise provided for in the confirmed plan or confirmation order. These exceptions to possession and vesting of title in debtor indicate that debtor is to

have no continuing interest in payments actually made pursuant to a confirmed plan.").

The timing of the trustee's conveyance of funds to creditors is often a matter of administrative practicality; a trustee would have authority to disburse most payments to creditors continuously and immediately. *See In re Hardin*, 200 B.R. 312, 313 (Bankr. E.D. Ky. 1996) ("[A]dministratively it is not possible to make a distribution upon receipt of each payment and often some accumulation will occur . . . prior to the making of a distribution to creditors."); *In re Redick*, 81 B.R. 881, 886 (Bankr. E.D. Mich. 1987) ("Had daily distribution been the practice, the question involved in these cases would never have arisen since no undistributed funds would ever have existed when these cases converted to Chapter 7."). In fact, some trustees do make disbursements more frequently than others. *See In re Michael*, 699 F.3d 305, 316 (3d Cir. 2012) (noting that "some trustees make plan disbursements twice a month, while some only once a month"). An entirely practical delay between the receipt of a payment by a trustee and the disbursement of funds to creditors is not a sound basis for determining substantive rights to the funds. *Waugh v. Saldamarco* (*In re Waugh*), 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988) ("The speed by which the chapter 13 trustee makes distribution should not determine the rights of creditors and debtors in the funds."). Even when the delay relates to substantive rights, it concerns the *creditors'* relative rights to the funds, not the debtor's rights. *See, e.g.*, *In re Pegues*, 266 B.R.

328, 337 (Bankr. D. Md. 2001) (granting a chapter 13 trustee's motion to disallow a claim as abandoned and authorizing the trustee to re-distribute the funds to other creditors after the case had converted to chapter 7).

Indeed, the facts of the case below emphasize the insubstantiality of a debtor's claim to funds remitted to the trustee. The petitioner made payments under the plan for approximately a year after the bankruptcy court granted stay relief to the mortgage creditor and during that time took no action to prevent the trustee from disbursing the plan payments to other creditors under the plan. (The record does not reveal why the debtor continued to make payments under the plan if the debtor did not intend to submit the funds to creditors.) The trustee had the authority to make these disbursements at any point during this time and had no obligation to hold funds at all. (The trustee apparently held the funds in order to provide the debtor an opportunity to respond to the grant of relief from the stay.[9] Resp. Br. 10.) A trustee's

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[9] "[A] creditor's claim or security is not finally determined in the relief from stay proceeding." *Veal v. Am. Home Mortg. Servicing, Inc.* (*In re Veal*), 450 B.R. 897, 914 (B.A.P. 9th Cir. 2011). The stay relief simply freed the mortgage creditor to pursue other remedies, such as foreclosure, outside of the bankruptcy process. The stay relief, in other words, would not necessarily have precluded a subsequent modification of the plan to resume payments to the creditor (perhaps on a modified loan or providing for the cure of a post-petition arrearage). *See* 11 U.S.C. § 1329.

temporary retention of funds simply provides no indication that the debtor retains rights to the funds.

III. Section 348(f) does not control the disposition of plan payments held by a chapter 13 trustee upon conversion to chapter 7

The petitioner frames the issue in this case in terms of the property of the estate. Contending that the plan payments held by a trustee prior to distribution to creditors represent property of the chapter 13 estate, the petitioner reasons that, upon conversion to chapter 7, the question is whether the funds are included in the chapter 7 estate. The NACTT submits, however, that the termination of a debtor's rights to plan payments under a confirmed chapter 13 plan occurs without regard to whether the plan payments represent property of *either* the chapter 13 estate or the chapter 7 estate.

A chapter 13 case revolves around the confirmation of a plan, not the determination of the property of the estate. (In fact, courts have struggled to develop a coherent theory of the chapter 13 estate.[10]) The property of the estate in a chapter 13 case is not irrelevant. For example, it affects the confirmation requirement that the chapter 13 plan provide for creditors to receive the present value of the amounts

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[10] *See generally* Resp. Br. 37 n.8.

they would receive in a chapter 7 liquidation.[11] *See* 11 U.S.C. § 1325(a)(4). But neither the effectiveness of a debtor's commitment of payments to the plan in exchange for its benefits – potential and immediate – nor the creditors' rights to the payments under the plan are dependent upon the determination of the property of the chapter 13 estate. Chapter 13 plan payments need not even come exclusively from property of the estate. *See* 11 U.S.C. § 1322(b)(8) (stating that a chapter 13 plan may "provide for the payment of all or part of a claim against the debtor from property of the estate or *property of the debtor*" (emphasis added)); *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995) ("Section 1322(b) allows a debtor to make plan payments from exempt property.")[12]; *see also Freeman v. Schulman (In re*

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[11] Property of the estate is also relevant in post-confirmation modifications. Section 1329 incorporates the requirements of § 1325(a), including § 1325(a)(4). 11 U.S.C. § 1329(b)(1). Even though post-petition assets would not necessarily have been included in a liquidation under chapter 7, "a majority of reported decisions fix the effective date for best-interests-of-creditors-test purposes at modification as the effective date of the plan as modified." Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 254.1, at ¶ 11 (4th ed., sec. rev. June 15, 2004), www.Ch13online.com.

[12] The ultimate holding of the *Hagel* case was that courts must consider social security income in determining a chapter 13 debtor's projected disposable income under § 1325(b). The 2005 amendments expressly exclude social security income from the "current monthly income" in the disposable income calculation. *See* 11 U.S.C. § 101(10A)(B). But this statutory change does not affect the court's preliminary conclusion regarding § 1322(b)(8).

Freeman), 86 F.3d 478, 481 (6th Cir. 1996) (concluding that the projected-disposable-income determination under § 1325(b) "does not turn in any way on whether the income was 'exempt' "). When a debtor submits funds that are not property of the estate (such as funds that the debtor has exempted from the estate under § 522), a trustee plainly has the authority to distribute the funds in accordance with the plan, and creditors plainly obtain rights to the funds through the plan.

Section 348(f) is not controlling in this case because it only addresses the determination of property of the estate in the converted case. The respondent does not argue, and the Fifth Circuit did not conclude, that creditors have rights to undistributed funds because the funds are included in the chapter 7 estate. The question of the fixation of rights under a confirmed plan does not turn on this issue. The Fifth Circuit's interpretation of § 348(f), moreover, hardly makes it superfluous. As the court explained, § 348(f) still clearly controls the disposition of post-petition assets not already relinquished to creditors under a chapter 13 plan, including not only the unanticipated windfalls involved in the cases cited in the congressional history of § 348(f), *see* H.R. Rep. No. 103-835, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366, but also post-petition income not turned over to the trustee for distribution to creditors under the chapter 13 plan.

IV. The respondent's position is not contrary to the congressional policy of supporting chapter 13

The petitioner contends that disbursing payments under a confirmed plan after conversion is inconsistent with congressional support for chapter 13. But this argument ignores the reason Congress supports chapter 13 and discounts the significant incentives the Code does provide to encourage chapter 13 cases.

Congress supports chapter 13 in large part because it promises a benefit to *creditors* in addition to debtors. Amendments to the Bankruptcy Code in 2005, in fact, push debtors with an ability to pay into chapter 13 precisely because chapter 13 promises a better return to creditors. *See supra* Part II.B. (describing the chapter 7 means test). The congressional policy of supporting chapter 13, therefore, does not translate into support for a rule that encourages chapter 13 simply by favoring debtors at the expense of creditors.

The respondent's position, moreover, far from eliminates the Bankruptcy Code's encouragement of chapter 13. For example, a chapter 13 discharge is still "broader than the discharge received in any other chapter." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 268 (2010) (quoting 8 *Collier on Bankruptcy* ¶ 1328.01, p. 1328-5 (rev. 15th ed. 2008)) (internal quotation marks omitted). And § 1326(a)(2) even provides the type of incentive the debtor suggests is necessary. It gives debtors breathing room to

attempt to obtain confirmation of a plan with limited risk, directing trustees to return plan payments to debtors (subject to some exceptions) if the court does not confirm a plan. 11 U.S.C. § 1326(a)(2). Section 348 also includes powerful incentives to attempt chapter 13 regardless of whether debtors are entitled to a refund of plan payments. Absent bad faith, § 348(f) provides that the property of the estate in a case that converts from chapter 13 to chapter 7 includes only the property of the estate, "as of the date of the filing of the petition, that remains in the possession of or is under the control of the debtor on the date of the conversion." 11 U.S.C. § 348(f)(1)(A). Property that diminishes in value or exits the estate during the chapter 13 case, therefore, is lost to creditors, even if the debtor had the benefit of the property during the chapter 13 case. Further, § 348(d) provides that post-petition, pre-conversion claims are included in the converted chapter 7 case, meaning that, absent bad faith, a debtor is entitled to discharge post-petition debt by submitting only pre-petition assets to liquidation.

V. The creditors' rights to plan payments made under a confirmed chapter 13 plan derive from the binding plan

The Fifth Circuit rejected the argument that specific creditors obtain a vested right to payment, holding instead that the creditors as a whole have a claim to undistributed funds at conversion that is superior to the debtor's. Pet. App. 28a. The NACTT

agrees with the thrust of the Fifth Circuit's decision – that the nature of the chapter 13 process gives creditors a claim to funds remitted to the trustee that is superior to the debtor's claim to the funds, even after conversion. But the NACTT urges the Court to clarify that the creditors' rights derive from the binding effect of the confirmed plan and that the plan, therefore, guides the distribution of plan payments held at conversion.

The NACTT does not dispute the Fifth Circuit's conclusion that the rights of *specific* creditors do not vest immediately upon trustee receipt. A trustee, for example, may hold funds pending the outcome of a claim dispute. *See, e.g.*, *In re Hufford*, 460 B.R. 172, 180-81 (Bankr. N.D. Ohio 2011). In that situation, the creditors as a whole have a claim to the funds that is superior to the debtor's, but the determination of the *specific* creditors' rights is subject to change prior to the actual distribution of the funds. The Fifth Circuit, however, did not provide clear guidance for determining the details of the creditors' "superior" claim to the undistributed funds. The court based its decision on considerations of policy and equity, Pet. App. 22a-28a, and though the opinion suggests that these considerations support distributions in accordance with the confirmed plan, the court did not state so directly. (Some of the confusion in this case may stem from the court's apparent conclusion that distributions in accordance with the confirmed plan would have required distributions to the mortgage creditor. *See* Pet. App. 17a. The NACTT, however, would submit that

the distributions the trustee made were consistent with the confirmed plan.[13]) The NACTT urges the Court to clarify that the creditors' rights to funds held by a chapter 13 trustee under a confirmed plan represent the rights to distributions in accordance with the confirmed chapter 13 plan. A holding that creditors' rights depend on a case-specific balancing of policy and equity would put trustees in the impossible position of having a duty to disburse funds to creditors but no instructions for making these disbursements.

CONCLUSION

For the foregoing reasons, the NACTT requests that the Court affirm the decision of the Court of Appeals but clarify that chapter 13 trustees have the

[13] In concluding that rights to plan payments do not vest in *specific* creditors, the court noted that, "if a right to [the undistributed] funds had vested specifically in Chase (the original intended recipient) when Harris made his payments to Viegelahn, the other creditors would have no right to them." Pet App. 17a. The plan, however, did provide for the trustee to "stop any further payment on [a] claim" upon entry of an order lifting the automatic stay. JA 32. The plan also accommodated the possibility of non-payment on any given claim by providing for available funds to flow to other creditors. *See* JA 28 ("Once Debtor's attorney fees are paid in full, those funds [apparently referring to funds remitted to the trustee] will be paid, pro rata, first to secured creditors, then to priority creditors and then to unsecured creditors."). The trustee's disbursement of funds, therefore, appears consistent with the confirmed plan.

authority to disburse pre-conversion payments in accordance with a confirmed chapter 13 plan.

Respectfully submitted,

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No. 14-400

IN THE
Supreme Court of the United States

CHARLES E. HARRIS, III,
Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when a debtor in good faith converts a bankruptcy case to Chapter 7 after confirmation of a Chapter 13 plan, undistributed funds held by the former Chapter 13 trustee are refunded to the debtor or distributed to creditors.

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H.R. Rep. No. 95-595 (1977) ..... *passim*

H.R. Rep. No. 103-835 (1994) 5, 23, 24

OTHER AUTHORITIES

Collier on Bankruptcy (16th ed.) 6, 13, 14

Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L. Rev. 67 (2006) 26

Teresa A. Sullivan, *et al.*, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L. Rev. 213 (2006) 25, 26

IN THE

Supreme Court of the United States

NO. 14-400

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is the only national organization dedicated to serving the needs of consumer bankruptcy

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amicus*, its members, and its counsel made such a contribution. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

attorneys and protecting the rights of consumer debtors in bankruptcy. NACBA has achieved national recognition for, among other things, filing amicus briefs in this Court and federal courts of appeals across the Nation. Many notable decisions have explicitly relied on NACBA's briefs. *E.g.*, *In re Woolsey*, 696 F.3d 1266, 1279 (10th Cir. 2012); *In re Puffer*, 674 F.3d 78, 80 (1st Cir. 2012).

From its work on behalf of consumer debtors, NACBA has developed extensive knowledge of, and unique insights into, the statutory provisions and policy considerations presented by this case. NACBA understands that Congress amended the Bankruptcy Code in the Bankruptcy Reform Act of 1994 (the "1994 Amendments") to ensure that, when a debtor converts a bankruptcy filing from Chapter 13 to Chapter 7 in good faith, undistributed post-petition funds in the Chapter 13 estate go to the debtor. The text, structure, and history of the relevant Bankruptcy Code provisions, as well as equitable considerations and public policy, confirm that interpretation.

STATEMENT

I. STATUTORY FRAMEWORK

The Bankruptcy Code provides several avenues for people and entities weighed down by debt to repay their creditors to the extent they are able, receive a discharge of most remaining debts, and exit bankruptcy with a clean financial slate. This case involves two options Congress has provided for individual debtors—Chapter 7 and Chapter 13. Chapter 13, the chapter under which petitioner Charles Harris originally filed, provides for repayment of debts from a debtor's future earnings. Chapter 7, by contrast, provides for repayment of debts by liquidating a debtor's existing non-exempt assets. Because Chapter 13 is often less disruptive to the debtor

and can provide greater relief to creditors, Congress has long sought to encourage debtors to take advantage of that option. Among other things, Congress has permitted debtors who pursue Chapter 13 to later convert to Chapter 7 without penalty in the event Chapter 13 does not work out.

A. Chapter 7

In a bankruptcy under Chapter 7, debts are paid by liquidating the debtor's non-exempt assets. A debtor can voluntarily file for Chapter 7 bankruptcy, 11 U.S.C. §301, but creditors can also force a debtor into Chapter 7 bankruptcy, *id.* §303.

Filing a bankruptcy petition under any chapter creates an "estate." 11 U.S.C. §541(a). Subject to certain exceptions, the Chapter 7 estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case"—that is, the debtor's pre-petition assets. *Id.* §541(a)(1). The Chapter 7 estate does *not* include the debtor's post-petition earnings for services performed after commencement of the case. *Id.* §541(a)(6).

Chapter 7 provides for appointment of a trustee, 11 U.S.C. §§701, 702, who collects and sells the estate property, *id.* §704(a)(1), and distributes the proceeds to creditors in accordance with the priorities set by the Bankruptcy Code, *id.* §726. Following those steps, for a consumer debtor, most debts are discharged. *Id.* §727. Chapter 7 bankruptcy thus gives the debtor a fresh start, but often at the price of losing a home or other assets.

B. Chapter 13

Chapter 13 is a debt restructuring program available to certain debtors with steady income. 11 U.S.C. §109(e). It differs from Chapter 7 in two key respects. First,

Chapter 13 is completely voluntary. A debtor must *elect* to petition for bankruptcy under Chapter 13. See *id.* §303 (limiting involuntary bankruptcy cases to Chapters 7 and 11 "only"). Second, Chapter 13 permits debtors to repay debts using their "future income" rather than proceeds from the sale of their assets. *Id.* §1322(a)(1). The Chapter 13 estate thus includes, in addition to a debtor's non-exempt assets at the time of filing, post-petition property that the debtor acquires or earns "after commencement of the case, but before the case is * * * converted to a case under chapter 7." *Id.* §1306(a). Creditors are typically paid from the debtor's post-petition earnings.

Like a Chapter 7 trustee, a Chapter 13 trustee is responsible for distributing estate property to creditors. See 11 U.S.C. §1302. Under Chapter 13, however, that distribution is made under a payment plan the debtor prepares. *Id.* §1321. The plan must provide for submission of part of the debtor's "future earnings * * * to the supervision and control of the [Chapter 13] trustee"; the trustee, in turn, distributes the money to creditors according to the confirmed plan. *Id.* §§1322(a)(1), 1326(c). To obtain confirmation from the bankruptcy court, the plan must provide for paying allowed secured claims in full or surrendering the collateral (unless the creditor holding the claim consents to different treatment), and for paying each unsecured creditor at least as much as it would have received under a Chapter 7 liquidation. *Id.* §1325(a)(4), (5).

Chapter 13 establishes a default rule that "the confirmation of a plan vests all of the property of the estate in the debtor," unless "otherwise provided in the plan or the order confirming the plan." 11 U.S.C. §1327(b). After confirmation, a Chapter 13 plan "may be modified, upon

request of the debtor, the trustee, or the holder of an allowed unsecured claim." *Id.* § 1329(a). Among other things, a plan may be modified to "increase or reduce the amount of payments on claims of a particular class [of creditors] provided for by the plan." *Id.* § 1329(a)(1).

Chapter 13 offers significant advantages over Chapter 7 to debtors and creditors alike. Because creditors are paid out of the debtor's future earnings, the debtor is able to keep existing assets, see 11 U.S.C. § 1306(b)—most importantly, a house—and protect those assets from liquidation. Creditors also benefit. By law, the confirmed Chapter 13 plan must give them at least as much as they would receive under a Chapter 7 liquidation. *Id.* § 1325(a)(4), (5). And in practice creditors often receive more under Chapter 13, particularly where a debtor has regular income but no assets subject to liquidation. In light of those advantages, Congress has expressed a strong policy of encouraging debtors to take advantage of Chapter 13 where possible. See *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 395 (1966); H.R. Rep. No. 103-835, at 57 (1994).

C. Conversion from Chapter 13 to Chapter 7

Consistent with its policy of encouraging debtors to choose Chapter 13, Congress has made it easy for debtors to fall back on Chapter 7 in the event Chapter 13 does not work out. The Bankruptcy Code grants a Chapter 13 debtor the non-waivable right to convert a Chapter 13 case to a Chapter 7 case "at any time" by filing a notice with the court. 11 U.S.C. § 1307(a).[2] No motion or court order is necessary. Fed. R. Bankr. P. 1017(f)(3).

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[2] A Chapter 13 debtor similarly may dismiss the case "at any time." 11 U.S.C. § 1307(b).

Conversion "does not commence a new bankruptcy case." *Collier on Bankruptcy* ¶348.02 (16th ed.). Rather, it *transforms* the debtor's pending case from one under Chapter 13 into one under Chapter 7. See 11 U.S.C. §348(a) (conversion "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief"). Conversion significantly changes how the case proceeds thereafter.

First, conversion to Chapter 7 automatically "terminates the service" of the Chapter 13 trustee, who is replaced by a Chapter 7 trustee. 11 U.S.C. §348(e); see *id.* §§701(a)(1), (b), 702. Second, conversion transforms the estate from a Chapter 13 estate to a Chapter 7 estate. As discussed above, a Chapter 13 estate includes the debtor's post-petition earnings while a Chapter 7 estate does not. The statute addresses that incongruity by providing that, in general, the "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition," provided the property "remains in the possession of or * * * under the control of the debtor on the date of conversion." *Id.* §348(f)(1)(A). Thus, after conversion, the estate generally consists of the same property that would have been included in the estate had the debtor filed under Chapter 7 in the first place, and excludes property the debtor acquired after filing the Chapter 13 petition.

Congress created an exception to that general rule for "bad faith" conversions. If the debtor converts in bad faith—*e.g.*, if the debtor "fraudulently conceal[s] significant assets," *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007)—the Chapter 7 estate will consist of the debtor's property "as of the date of conversion," 11 U.S.C. §348(f)(2). Thus, only where a debtor acts in bad faith are post-petition assets considered "property of the

estate in the converted case" and subject to distribution to creditors after conversion. *Ibid.*

II. Proceedings Below

Like many Americans in recent years, Charles Harris fell behind on his mortgage in 2010. He also carried a number of other debts. Harris had no non-exempt assets that could be liquidated to pay his creditors under Chapter 7, but he still had regular income. Given his circumstances, Harris sought to make good on his obligations by restructuring his debts under Chapter 13.

Harris filed a voluntary petition for Chapter 13 bankruptcy and proposed a plan for paying his creditors in full. J.A. 26-39. Under the plan, Harris would surrender his car to his auto lender and resume making scheduled payments to his mortgage lender. J.A. 34. His other debts would be restructured and paid off over 60 months using his future income. J.A. 26-27, 38. To accomplish that, $530 would be deducted from Harris's wages each month and submitted to the Chapter 13 trustee, respondent Mary Viegelahn. J.A. 37-38. The trustee, in turn, would distribute that money to Harris's creditors according to the plan's schedule. J.A. 27.

The confirmation order displaced Chapter 13's default rule that "confirmation of a plan vests all of the property of the estate in the debtor," 11 U.S.C. § 1327(b), providing that "[a]ll property of the estate * * * shall not revest in the Debtor." J.A. 48. The order further provided that "[s]uch property as may revest in the Debtor shall so revest * * * upon * * * conversion." *Ibid.* In other words, in the event Harris converted his case to Chapter 7, any property that did not become part of the Chapter 7 estate would then revest in Harris.

Regrettably, Harris was unable to keep current with his scheduled mortgage payments. In November 2010, his mortgage lender received permission to foreclose on Harris's house. Pet. App. 4a. Thereafter, the trustee stopped distributing the $352 of Harris's monthly wage deductions that were earmarked for the lender, as the plan required. See J.A. 28-29, 34. No other creditor sought to modify the plan or to have those funds redistributed to other creditors. Nor did the trustee. Those funds thus accumulated as Harris continued to have deductions from his wages submitted to the trustee. Pet. App. 4a.

After about a year of continuing to pay under the Chapter 13 plan despite losing his house, in November 2011 Harris exercised his right to convert his case to Chapter 7. Pet. App. 4a. That conversion automatically "terminate[d] the service of [the Chapter 13] trustee." 11 U.S.C. §348(e). The next month, Harris's newly appointed Chapter 7 trustee reported that Harris had no non-exempt property. J.A. 8. Harris's remaining creditors thus received nothing from the Chapter 7 estate, although Harris had already paid about $6,000 under the Chapter 13 plan. Chapter 13 Standing Trustee's Final Report & Account 3, ECF No. 36. The bankruptcy court later granted Harris a discharge of his debts.

Following the conversion, the former Chapter 13 trustee still held more than $4,300 of Harris's wages that had been earmarked for his mortgage lender. Pet. App. 4a. She distributed those funds to Harris's other creditors on December 1, 2011—after the conversion to Chapter 7 and the concomitant termination of her service. *Ibid.*

Harris moved to compel the refund of the money. Pet. App. 5a. The bankruptcy court granted the motion, and the district court affirmed. Pet. App. 29a-49a. The Fifth

Circuit reversed, holding that, despite the conversion of Harris's case from Chapter 13 to Chapter 7, the former Chapter 13 trustee was authorized to distribute Harris's post-petition wages to his Chapter 13 creditors. Pet. App. 1a-28a.

SUMMARY OF ARGUMENT

I.A. The Bankruptcy Code's plain text controls this case. "Conversion" of a Chapter 13 case to Chapter 7 automatically "terminates the service" of the Chapter 13 trustee. 11 U.S.C. §348(e). As a result, the now-former Chapter 13 trustee no longer has authority to carry out the quintessential service performed by a Chapter 13 trustee—distributing the debtor's post-petition earnings to creditors. While the former Chapter 13 trustee may perform certain ministerial tasks after conversion, nothing authorizes a former trustee to distribute property to creditors or otherwise affect the debtor's and creditors' respective substantive rights.

Chapter 13 reinforces that result by establishing a default rule that the estate property vests in the debtor upon confirmation of the plan. Earnings submitted to the Chapter 13 trustee do not vest in creditors until they are actually distributed to creditors. Any undistributed funds at the time of conversion thus rightfully belong to the debtor.

B. The Bankruptcy Code's structure supports that reading of Chapter 13. A Chapter 7 estate following conversion normally includes only the debtor's property at the time of the Chapter 13 filing. Payments to creditors after conversion to Chapter 7 are thus made from the debtor's *pre-petition* assets. The Code contemplates that a debtor's *post-petition* assets will be distributed to creditors after conversion only where the debtor acted in bad faith. To permit a trustee to distribute a debtor's post-

petition earnings to creditors after a *good-faith* conversion defies that design.

Chapter 13 is also designed to be completely voluntary. Debtors cannot be forced to enter, or to remain in, Chapter 13 cases against their will. The decision below improperly tethers debtors to Chapter 13 cases after they have withdrawn their consent to be subject to Chapter 13.

The Fifth Circuit characterized the former trustee's post-conversion distributions to creditors as payments "pursuant to the Chapter 13 plan." Pet. App. 2a. But a Chapter 13 plan ceases to have legal effect once the case is converted to one under Chapter 7, because "Chapter 13 * * * applies only in a case under such chapter." 11 U.S.C. § 103(i).

Finally, some provisions of the Bankruptcy Code determine rights based on payments made "as of the date of conversion." 11 U.S.C. § 348(f)(1)(C)(i). Congress plainly did not contemplate that a former Chapter 13 trustee would pay creditors *after* conversion.

C. The Bankruptcy Code's legislative history confirms that post-petition property belongs to the debtor following good-faith conversion. Congress sought to encourage debtors to attempt Chapter 13 bankruptcy, and it recognized that enabling creditors to obtain post-petition property following conversion would be a serious disincentive to pursuing Chapter 13. The 1994 Amendments clarified that, following conversion, post-petition property would not become part of the Chapter 7 estate (and thus would not be distributed to creditors) absent bad faith. Permitting distribution of post-petition funds after conversion would recreate the same disincentive that Congress sought to eliminate.

II.A. Returning undistributed Chapter 13 funds to debtors after conversion to Chapter 7 will go a long way toward giving honest but unfortunate debtors the "fresh start" the Bankruptcy Code was designed to provide. The few thousand dollars at issue in this and similar cases will help debtors get back on their feet as they exit bankruptcy.

B. The rule adopted below gives debtors an incentive to skip Chapter 13 and proceed directly to Chapter 7. But Chapter 13 provides benefits to both debtors and creditors. It allows debtors to protect some assets and offers creditors more recovery. The decision below ignores that reality.

C. By allowing creditors to recover undistributed Chapter 13 funds after conversion to Chapter 7, the Fifth Circuit's rule effectively requires debtors to lose post-petition income under Chapter 13 at the same time that other assets are liquidated under Chapter 7. That undermines Congress's choice to keep Chapters 7 and 13 mutually exclusive and cannot be reconciled with Congress's preference for Chapter 13 over Chapter 7.

D. The Fifth Circuit's policy arguments do not withstand scrutiny. The court posited that its rule will not deter debtors from proceeding under Chapter 13. But the prospect of losing undistributed funds to creditors after conversion, rather than recovering that money, surely makes Chapter 13 less attractive.

The court also argued that giving creditors undistributed funds would prevent debtors from receiving a windfall. But that ignores Congress's decision to allow debtors to trade their Chapter 13 obligations for different Chapter 7 obligations "at any time." 11 U.S.C. §1307(a). And it overlooks the fact that every creditor here re-

ceived everything it expected to receive until the time of conversion.

ARGUMENT

I. THE BANKRUPTCY CODE REQUIRES THAT UNDISTRIBUTED POST-PETITION FUNDS IN A FORMER CHAPTER 13 ESTATE BE RETURNED TO THE DEBTOR AFTER GOOD-FAITH CONVERSION TO CHAPTER 7

The text, structure, and history of the relevant Bankruptcy Code provisions all point to the same conclusion: Harris, not his creditors, was entitled to any post-petition funds in the former Chapter 13 trustee's hands upon the conversion of Harris's case to Chapter 7.

A. The Statutory Text Requires the Former Chapter 13 Trustee To Return Undistributed Funds to the Debtor After Conversion, Not To Continue To Distribute Them to Creditors

Two statutory provisions independently decide the question presented. Section 348(e) provides that conversion to Chapter 7 automatically "terminates the service" of the Chapter 13 trustee, stripping the now-former trustee of power to make further distributions to creditors. And Section 1327(b) establishes a default rule that post-petition earnings (and all other estate property) vest in the debtor upon confirmation of a Chapter 13 plan, demonstrating that the debtor is entitled to those funds upon conversion.

1. *Conversion "Terminates" the Chapter 13 Trustee's Authority To Distribute Funds to Creditors*

a. The text of the Bankruptcy Code makes clear that a Chapter 13 trustee has no authority to distribute funds to creditors after conversion. The statute assigns certain duties and responsibilities to a Chapter 13 trustee with

respect to the debtor's post-petition earnings: During the Chapter 13 case, she must exercise "supervision and control" over the portion of the debtor's earnings that are submitted to her, 11 U.S.C. §1322(a)(1), and "make payments to creditors under the plan," *id.* §1326(c). Conversion to Chapter 7, however, automatically "terminates the service of any trustee * * * that is serving in the case before such conversion." *Id.* §348(e). Thus, upon conversion, the Chapter 13 trustee becomes the *former* Chapter 13 trustee. She is accordingly stripped of the power to control the debtor's earnings and distribute them to creditors. See *Collier on Bankruptcy* ¶348.02[1]. Nothing in the Bankruptcy Code authorizes a *former* trustee to distribute funds to creditors or otherwise carry out a *defunct* Chapter 13 plan. Contrast 11 U.S.C. §1326(c) ("the trustee shall make payments to creditors under the plan"). It follows that any post-petition earnings in the former Chapter 13 trustee's possession after conversion cannot be distributed to creditors.

b. The Fifth Circuit deemed the termination of the Chapter 13 trustee's service immaterial because the former trustee must still perform certain duties to "'clean-up and finalize'" administration of the Chapter 13 estate. Pet. App. 11a. The court found "'no logical reason why distribution of funds pursuant to the previously confirmed reorganization plan cannot be included as one of those administrative duties.'" *Ibid.* The reason is that a former Chapter 13 trustee's remaining administrative duties are both extremely limited in scope and required by statute, while continued distribution of the debtor's earnings to creditors is neither.

Federal Rule of Bankruptcy Procedure 1019 enumerates two specific tasks the former Chapter 13 trustee must perform after conversion. First, she must "turn

over to the chapter 7 trustee all records and property of the estate" still in her hands. Fed. R. Bankr. P. 1019(4). That obligation does not reflect any continuing authority held by the former Chapter 13 trustee, but rather the superseding power of the new Chapter 7 trustee to "collect" the property of the Chapter 7 estate, 11 U.S.C. §704(a)(1), "wherever located and by whomever held," *id.* §541(a). If anything, the "rule recognizes that the chapter 13 trustee has no further duties with respect to estate property once conversion has occurred." *Collier on Bankruptcy* ¶348.02[1]. A private party holding the same property would be under the same obligation to turn it over to the new Chapter 7 trustee. Cf. 11 U.S.C. §521(a)(4) (debtor must "surrender to the trustee all property of the estate and any recorded information * * * relating to property of the estate").

Second, the former Chapter 13 trustee must "file and transmit to the United States trustee a final report and account." Fed. R. Bankr. P. 1019(5)(B)(ii). That ministerial duty is also rooted in the statute: Every trustee is required to "make a final report and file a final account of the administration of the estate with the court and with the United States trustee," 11 U.S.C. §704(a)(9); see *id.* §1302(b)(1) (duty applies to Chapter 13 trustees), and the Chapter 13 trustee can make a "final" report and account only after the Chapter 13 case has concluded.

Those post-conversion responsibilities at most show that Congress contemplated two narrow, procedural exceptions to the rule that conversion terminates the service of a Chapter 13 trustee. By contrast, nothing in the Bankruptcy Code or Rules suggests that a former Chapter 13 trustee retains the authority to distribute funds to creditors. That is fatal to any claim of such power. See *Travelers Cas. & Sur. Co. of Am.* v. *Pac. Gas & Elec. Co.*,

549 U.S. 443, 453 (2007) ("'[W]here Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly.'"). And it is no wonder that Congress did not create such an exception: Distribution of funds to creditors is the quintessential "service" rendered by the trustee in a Chapter 13 case. If that power were not "terminate[d]" upon conversion to Chapter 7, 11 U.S.C. §348(e), it is hard to imagine what would be.

c. The Fifth Circuit quibbled that, if a trustee's services were "literally" terminated by conversion, then the former Chapter 13 trustee "would be unable to return [undistributed] funds" to *anyone*, including the debtor. Pet. App. 10a. But the former trustee must hand over the funds to someone; she does not get to keep them for herself. And even if returning funds to the debtor were considered a "service," it is different in kind from distributing funds to creditors. Returning the funds has no effect on the debtor's and creditors' respective substantive rights; the debtor continues to owe the same debt as he did when the trustee held the funds. Cf. Pet. App. 17a (creditors have no vested right to receive undistributed funds before or after conversion). Distributing the funds, however, changes the debtor's and creditors' rights; the payment extinguishes part of the debt to the creditors who receive payment.[3]

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[3] Extinguishing that unsecured debt is not necessarily to the debtor's advantage. While in some cases the extinguished debt would have been paid anyway with liquidation proceeds under Chapter 7, in other cases (like this one) there will be no assets subject to liquidation, and the debtor would have been entitled to discharge of the debt without any further payment.

Additionally, a debtor generally receives no credit for Chapter 13 payments if the debtor seeks to redeem property securing a claim

If "terminat[ion]" of the Chapter 13 trustee's service has any meaning, it must mean that conversion strips the (former) trustee of the power to reshape parties' substantive rights by continuing to distribute funds to creditors. Returning undistributed funds to the debtor does not affect substantive rights, and so fits comfortably beside the former Chapter 13 trustee's purely procedural post-conversion duties.

2. *Chapter 13 "Vests" Post-Petition Earnings in the Debtor, Not in Creditors*

Chapter 13's text confirms that undistributed post-petition earnings belong to the debtor upon conversion by explicitly vesting post-petition earnings in the debtor. Nothing in the statutory text indicates that creditors have any vested right to Chapter 13 estate property until funds are actually distributed to them.

Chapter 13 establishes a default rule that, "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. §1327(b). A debtor's post-petition earnings are plainly "property of the [Chapter 13] estate." *Id.* §1306(a)(2). Court after court—including the Fifth Circuit below—has thus properly concluded that, until funds from the Chapter 13

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after conversion. See 11 U.S.C. §722; *id.* §348(f)(1)(B). For example, if a debtor owes $6,000 on a car worth $2,000 and the former Chapter 13 trustee distributes $1,000 held at the time of conversion to the auto lender, the total debt on the car will be reduced to $5,000, but the debtor will still have to pay the creditor another $2,000 (the car's value) to redeem the car. By contrast, if the former trustee returns the $1,000 to the debtor, the debtor can pay that money to the creditor and redeem the car for only another $1,000. Under the Fifth Circuit's approach, debtors seeking to redeem after conversion are effectively forced to pay twice.

estate are *actually distributed* to creditors, those funds do not belong to creditors. See Pet. App. 16a-18a; *In re Plata*, 958 F.2d 918, 922 (9th Cir. 1992). It follows that any funds that remain undistributed upon conversion to Chapter 7 should be returned to the debtor, their rightful owner.

To be sure, Section 1327's vest-in-the-debtor rule can be displaced where "otherwise provided in the plan or the order confirming the plan." 11 U.S.C. § 1327(b). And the plan and confirmation order in this case did "otherwise provid[e]." But that makes no difference because neither vested the estate property in Harris's *creditors*. The plan provides that, rather than vesting in Harris, "all property of the estate * * * shall remain as property of the estate." J.A. 31. That provision plainly did not vest the estate property in creditors because the estate includes property (such as Harris's non-disposable income and pre-petition assets) that would never go to creditors under the Chapter 13 payment plan. The order confirming the plan, moreover, explicitly provided that "[s]uch property as may revest in the Debtor shall so revest * * * *upon* * * * *conversion*." J.A. 48 (emphasis added). Accordingly, once Harris exercised his right to convert his case to Chapter 7, all of the former Chapter 13 estate property that did not become part of the new Chapter 7 estate revested in him. Undistributed funds in the former Chapter 13 trustee's hands thus should have been returned to Harris upon conversion, the same as if the money had remained vested in him the whole time.

B. The Bankruptcy Code's Structure Confirms That Post-Petition Property Should Go to the Debtor, Not Creditors, After Good-Faith Conversion

The Fifth Circuit's decision also conflicts with the Bankruptcy Code's overall structure. Numerous provisions make clear that, after conversion to Chapter 7, no post-petition earnings may be distributed to creditors absent bad faith, and no distributions at all may be made pursuant to the Chapter 13 plan.

1. *Post-Petition Assets May Be Distributed to Creditors After Conversion Only Where the Debtor Converted in Bad Faith*

A chief distinction between Chapter 7 and Chapter 13 is that, under Chapter 7, creditors are paid using *pre-petition* assets, while under Chapter 13 creditors are paid using *post-petition* assets. See pp. 3-5, *supra*. Congress preserved that distinction in cases that are converted from Chapter 13 to Chapter 7. It provided that the estate property in the converted Chapter 7 case is determined "as of the date of filing of the petition," 11 U.S.C. §348(f)(1)(A), and that "the date of the filing of the petition" continues to be the date of the original Chapter 13 filing, *id.* §348(a). Accordingly, once a debtor converts his case to Chapter 7, money the debtor earned after he filed his Chapter 13 petition is carved out from the estate—and placed off-limits to creditors.

Congress created one narrow exception to that rule, providing that, "if the debtor converts a case under chapter 13 * * * in bad faith," the estate property "shall consist of the property of the estate *as of the date of conversion*." 11 U.S.C. §348(f)(2) (emphasis added). That exception punishes bad-faith conversions by making otherwise-immune post-petition earnings (and other post-

petition assets) available for liquidation and distribution to creditors after conversion to Chapter 7.

The decision below defies that design. Section 348(f) makes clear that post-petition wages should be distributed to creditors after conversion to Chapter 7 *only if the debtor converted in bad faith*. The Fifth Circuit, however, allowed creditors to take post-petition earnings after a *good-faith* conversion. In doing so, it effectively subjected Harris to the penalty for bad-faith conversion without any finding—or even allegation—of bad faith. That is flatly inconsistent with the framework Section 348(f) prescribes, and it will discourage debtors from invoking Chapter 13 as Congress intended.

2. *Chapter 13 Is Designed To Be Completely Voluntary*

In enacting Chapter 13, Congress expressed concern that forcing debtors "to toil for the benefit of creditors" would violate "the Thirteenth Amendment's involuntary servitude prohibition." *Toibb* v. *Radloff*, 501 U.S. 157, 165-166 (1991). Congress thus structured Chapter 13 as a "completely voluntary" repayment program. H.R. Rep. No. 95-595, at 120 (1977).

A debtor cannot be forced into a Chapter 13 repayment plan under any circumstances. Only a debtor may petition for Chapter 13 bankruptcy and file a plan. 11 U.S.C. §§ 301(a), 1321. Even where a debtor initially files under Chapter 7 and the bankruptcy court "finds that the granting of relief would be an abuse" of Chapter 7 in light of the debtor's significant monthly income, the case may be converted to Chapter 13 only "with the debtor's consent." *Id.* § 707(b)(1).

Likewise, a debtor cannot be forced to *stay* in a Chapter 13 case involuntarily. A Chapter 13 debtor has the

right to convert the case to Chapter 7—or dismiss it outright—"at any time." 11 U.S.C. §1307(a), (b). Congress reinforced that right of immediate exit by mandating that "[a]ny waiver * * * is unenforceable." *Ibid.*

Congress thus crafted the Bankruptcy Code to ensure that a debtor's earnings are not applied toward a Chapter 13 repayment plan any longer than the debtor voluntarily submits to the plan. The decision below, however, effectively allows a former Chapter 13 trustee to keep a debtor tethered to a repayment plan against the debtor's will. Any distributions the former trustee makes to creditors after the debtor elects to leave Chapter 13 are *involuntary* payments, in contravention of the statutory design.

3. *A Chapter 13 Plan Cannot Be Applied After Conversion to Chapter 7*

The Fifth Circuit characterized the post-conversion distribution of funds to Harris's creditors as being made "pursuant to the Chapter 13 plan." Pet. App. 2a. Of course, if the former Chapter 13 trustee *did* have authority to distribute the funds, it must have been "pursuant to the Chapter 13 plan"; post-petition funds could not be distributed pursuant to Chapter 7, nor could the former trustee distribute them on a whim, pursuant to nothing. But the Bankruptcy Code makes clear that after conversion there is no longer a "Chapter 13 plan" under which distributions to creditors can be made.

Once a debtor exercises the right to convert to Chapter 7, the Chapter 13 plan immediately ceases to have continuing legal force. That is because the plan draws its legal effect from provisions of Chapter 13, see 11 U.S.C. §§1322, 1325, 1327, and "Chapter 13 * * * applies only in a case under such chapter," *id.* §103(i). After conversion, the case is no longer one under Chapter 13; it is "a case

under Chapter 7." *Id.* §1307(a). Under the Bankruptcy Code's plain terms, Chapter 13 can no longer govern.

The Fifth Circuit recognized that conversion terminates the Chapter 13 plan. Pet. App. 18a. The court nonetheless held that the former Chapter 13 trustee may continue to distribute funds "pursuant to the Chapter 13 plan." Pet. App. 2a. That approach cannot be reconciled with Congress's command that Chapter 13—including its provisions governing repayment plans—may not be "applie[d]" in a case that is not "a case under such chapter." 11 U.S.C. §103(i).

Additionally, the post-conversion distributions here may not have even been made pursuant to the *terms* of the defunct Chapter 13 plan. The plan did not provide for reallocating funds earmarked for the mortgage lender to other creditors after the foreclosure; that is why the funds accumulated in the trustee's hands. Nor was the plan ever modified—before or after conversion—to allow reallocation. It is thus unclear whether anything even *purported* to authorize the former trustee's actions.

4. *The Bankruptcy Code Contemplates That Chapter 13 Distributions Will End upon Conversion*

Some provisions of the Bankruptcy Code expressly turn on the state of affairs as of the date of conversion. For example, a creditor holding security "shall continue to be secured" after conversion "unless the full amount of [the] claim determined under applicable nonbankruptcy law has been *paid in full as of the date of conversion*, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13." 11 U.S.C. §348(f)(1)(C)(i) (emphasis added). Similarly, if a pre-bankruptcy default is not "*fully cured* * * * *at the time of*

conversion," after conversion it has the "effect given under applicable nonbankruptcy law." *Id.* §348(f)(1)(C)(ii) (emphasis added).

The decision below, however, raises the prospect of claims that are *not* paid in full "as of the date of conversion," but later *become* paid in full because of a distribution by the former Chapter 13 trustee. Likewise, a default could be *not* fully cured "at the time of conversion," but later *become* cured by a post-conversion distribution. Neither situation is covered by the statute. Post-conversion distributions by a former Chapter 13 trustee thus may interfere with the determination of rights in the Chapter 7 case. At the very least, Section 348(f)(1)(C)'s reference to Chapter 13 payments "as of the date of conversion" makes clear that Congress did not contemplate Chapter 13 payments continuing *after* the date of conversion.

C. The History of Section 348 Confirms That Congress Intended Undistributed Funds in a Chapter 13 Estate To Belong to the Debtor Following Conversion

Section 348's legislative history shows that Congress recognized that allowing creditors to reach post-petition assets in a converted case would often penalize debtors who first invoke Chapter 13 compared to those who initially proceed under Chapter 7. Consistent with its longstanding policy of promoting use of Chapter 13 wherever possible, Congress sought to eliminate that disincentive. The decision below defies that congressional purpose by erecting precisely the same sort of obstacles to invoking Chapter 13 that Congress sought to eliminate two decades ago.

Congress enacted Section 348(f) in 1994 to "resolve a split in the case law about what property is in the bank-

ruptcy estate when a debtor converts from chapter 13 to chapter 7." H.R. Rep. No. 103-835, at 23, 57. Before the 1994 Amendments, federal courts had divided over whether post-petition property became part of the Chapter 7 estate upon conversion from Chapter 13.

In *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991), the Seventh Circuit held that the entire Chapter 13 estate became part of the Chapter 7 estate upon conversion, and therefore post-petition assets were available for liquidation and distribution to creditors. *Id.* at 136-138. The Seventh Circuit determined that Section 348, as it then existed, left the court at a "semantic impasse." *Id.* at 137. Troubled by the possibility of "strategic, opportunistic behavior" by debtors using conversion to shield post-petition property from creditors, the court concluded that "the only cure is to rule that the Chapter 13 estate passes unaltered into Chapter 7 upon conversion." *Id.* at 137-138. Thus, in *Lybrook*, land the debtor inherited after his Chapter 13 filing but before conversion to Chapter 7 was deemed part of the Chapter 7 estate and subject to liquidation—even though it would have been excluded had he originally filed under Chapter 7.

In *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985), by contrast, the Third Circuit held that post-petition property did *not* become part of the converted Chapter 7 estate. *Id.* at 799-800, 803. That result, the court explained, "is consonant with the Bankruptcy Code's goal of encouraging the use of debt repayment plans rather than liquidation." *Id.* at 803. "If debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished." *Ibid.* Contrary to the Seventh Cir-

cuit's rationale in *Lybrook*, the Third Circuit concluded that "when chapter 13 does prove unavailing no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts." *Ibid.*

In the 1994 Amendments, Congress came down squarely in favor of debtors who try Chapter 13. It rejected "cases such as *Matter of Lybrook*, and adopt[ed] the reasoning of *In re Bobroff*." H.R. Rep. No. 103-835, at 57 (citations omitted). In endorsing *Bobroff*, Congress recognized that *Lybrook*'s rule allowing creditors to reach post-petition assets after conversion to Chapter 7 would pose a "serious disincentive to chapter 13 filings." *Ibid.*

At the same time, Congress was not deaf to the Seventh Circuit's concerns—echoed below—that debtors might use conversion "opportunistic[ally]" to stymie their creditors. *Lybrook*, 951 F.2d at 137; see Pet. App. 28a. Congress included Section 348(f)(2), the "bad faith" exception, as an essential component of the revised statutory scheme. As the House Report explains, Section 348(f)(2) "gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case." H.R. Rep. No. 103-835, at 57. Absent bad faith, however, Congress intended that post-petition assets be off-limits to creditors after conversion from Chapter 13 to Chapter 7.

Allowing a former Chapter 13 trustee to distribute the debtor's post-petition earnings to creditors after conversion defies that congressional intent. It creates a "serious disincentive to chapter 13 filings," H.R. Rep. No. 103-

835, at 57, by exposing more of an honest debtor's assets to creditors without offering any discernible benefit to the debtor. The decision below thus erects the same disincentives to Chapter 13 that Congress sought to abolish.

II. THE EQUITIES AND PUBLIC POLICY FAVOR RETURNING UNDISTRIBUTED CHAPTER 13 ESTATE FUNDS TO THE DEBTOR AFTER CONVERSION

Equitable considerations and public policy confirm that Harris, not his creditors, was entitled to any post-petition funds in the former Chapter 13 trustee's hands when he chose to convert to Chapter 7.

A. Equitable Considerations Favor the Debtor Retaining Undistributed Chapter 13 Funds

People declare bankruptcy for a variety of reasons. Most bankruptcies, however, are caused by a sudden setback: "a job loss, failure of a small business, a cutback in hours worked, or some other income interruption." Teresa A. Sullivan, *et al.*, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L. Rev. 213, 220 (2006). Those precipitating events reduce the ability of individuals and families to pay their debts, forcing some into bankruptcy.

The "primary purpose" of the Bankruptcy Code is to "afford[] debtors a fresh start." *Judd* v. *Wolfe*, 78 F.3d 110, 117 (3d Cir. 1996). By entering and exiting bankruptcy, the "honest but unfortunate debtor" is supposed to obtain "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934).

Honest but unfortunate debtors still face significant hurdles even after emerging from Chapter 7. Debtors

are often strapped for cash. One major study found that the median household income of bankruptcy filers in 2001 was $20,172, less than half the nationwide median income. Sullivan, *et al.*, *supra*, at 223. Ninety-four percent of filers had incomes below the nationwide median, and 41% were below the federal poverty line. *Id.* at 223 n.35.

The Chapter 7 liquidation process, moreover, neither relieves debtors from the burdens of non-dischargeable debts like tax debts or student loans, see 11 U.S.C. §523, nor frees debtors from ongoing payments on mortgages or car loans, see *id.* §1328(a). And it does not alleviate the financial hardships that led debtors to file for bankruptcy in the first place. As a result, individuals emerging from Chapter 7 bankruptcy often continue to struggle to pay for basic obligations, such as utilities, a car, housing, taxes, education, and medical expenses. See Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L. Rev. 67, 85 (2006).

That is particularly true for debtors who convert to Chapter 7 after attempting a Chapter 13 payment plan. Such debtors will not merely face financial hardship common to all debtors emerging from bankruptcy. They also will have depleted a substantial portion of their income during the unsuccessful Chapter 13 case. More so than debtors who never attempt Chapter 13, debtors who convert will have spent months or years of income toward paying off creditors. In doing so, debtors often put off household expenses, and face the consequences after they emerge from bankruptcy.

Providing undistributed Chapter 13 funds to debtors who choose Chapter 7 will go a long way toward giving debtors the fresh start the Bankruptcy Code was designed to provide. The $4,300 at issue in this case—like the $9,200 at issue in *In re Michael*, 699 F.3d 305, 307 (3d

Cir. 2012)—might seem like a relatively small amount of money to some. But it represents a substantial portion of the typical bankruptcy filer's annual income, and will help filers exiting bankruptcy meet the challenges of paying for basic necessities and non-dischargeable debt. The Third Circuit's rule embraces that reality. The Fifth Circuit's does not.

B. Proceeding Under Chapter 13 Offers Numerous Benefits to Debtors and Creditors Alike

A rule that precludes debtors from recovering their undistributed funds will prompt debtors to forego Chapter 13 and declare Chapter 7 bankruptcy at the outset. Proceeding under a Chapter 13 plan, however, offers significant advantages to debtors with steady income. "[D]eveloping a plan of repayment under Chapter 13, rather than opting for liquidation under Chapter 7, * * * permits the debtor to protect his assets." H.R. Rep. No. 95-595, at 118. Chief among the concerns of consumer debtors is protecting their homes, cars, and other necessities. While some of that property is exempt from the Chapter 7 estate, those exemptions are subject to strict caps. See, *e.g.*, 11 U.S.C. §522(d)(1), (2); 78 Fed. Reg. 12,089, 12,090 (2013) ($22,975 homestead exemption and $3,675 motor vehicle exemption). For example, a debtor who has home equity exceeding the applicable homestead exemption cap may see his house sold by the Chapter 7 trustee. Similarly, a debtor who has a paid-off vehicle worth more than the vehicle exemption may see it liquidated. Proceeding under Chapter 13 allows a debtor to protect these basic assets by paying creditors with future earnings instead.

Chapter 13 also provides other benefits to debtors. It "protects a debtor's credit standing far better than a straight bankruptcy." H.R. Rep. No. 95-595, at 118.

Post-bankruptcy, creditors frequently view an individual who tried to pay off debts under Chapter 13 more favorably than one who opted for Chapter 7. *Ibid.*

At the same time, Chapter 13 offers significant advantages for creditors. "The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy" under Chapter 7. H.R. Rep. No. 95-595, at 118. As this Court recognized in *Perry*, "wage earners ordinarily have little or no assets available for distribution in straight bankruptcy" under Chapter 7. 383 U.S. at 396. Accordingly, recoveries under Chapter 13 "represent settlements which * * * creditors [would be] unable to obtain" under Chapter 7. *Ibid.* (discussing former Chapter XIII).

C. Distributing Chapter 13 Estate Funds to Creditors After Conversion Undermines the Distinction Between Chapter 13 and Chapter 7 and the Congressional Policy Favoring Chapter 13

Chapter 7 and Chapter 13 are fundamentally different types of cases. "In a [Chapter 7] liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under Chapter 13, the debtor may retain his property by agreeing to repay his creditors" from his future earnings. H.R. Rep. No. 95-595, at 118. Congress designed these two options to be mutually exclusive. *Id.* at 6 ("Cases are filed under only one of the four operative chapters."); see 11 U.S.C. §103(b) (relevant provisions "of chapter 7 * * * apply only in a case under such chapter"); *id.* §103(i) ("Chapter 13 * * * applies only in a case under such chapter."); *id.* §1307(a) (conversion changes "a case under this chapter [13] to a case under chapter 7"). Consequently, the debtor has two distinct and exclusive ways to discharge debts:

liquidate pre-petition assets, or give up part of his post-petition income.

Giving undistributed Chapter 13 funds to creditors after conversion requires debtors to liquidate pre-petition assets *and* give up post-petition income *at the same time*. Debtors must surrender in the Chapter 7 case property they would have surrendered if they had filed under Chapter 7 initially. 11 U.S.C. §348(f)(1)(A). But they must also surrender additional post-petition income—the undistributed Chapter 13 funds—under the guise of the defunct Chapter 13 plan. Debtors effectively must pay creditors under two bankruptcies simultaneously. Faced with the reality that thousands of dollars of undistributed funds may disappear even *after* they choose to convert to Chapter 7, many debtors will have an incentive to skip Chapter 13.

That incentive undermines the congressional preference for Chapter 13 over Chapter 7. Congress has clearly expressed its intention that Chapter 13 proceedings be the first recourse for bankrupt debtors: While "use of the bankruptcy law should be a last resort," "if it is used, debtors should attempt repayment under Chapter 13." H.R. Rep. No. 95-595, at 118. That preference for payment plans for wage earners dates back to Chapter XIII, the predecessor to Chapter 13. See *Perry*, 383 U.S. at 396-397. A rule that pays undistributed Chapter 13 funds to creditors rather than debtors—deterring some debtors from petitioning under Chapter 13—cannot be reconciled with that preference.

Filing under Chapter 13 is already risky. If a debtor cannot make all required payments under the plan, he may have no choice but to convert to Chapter 7. In that case, the debtor will end up paying more than he would have under an initial Chapter 7 filing: He will lose the

property he had originally hoped to preserve, plus any income paid to creditors during the Chapter 13 proceeding. Under the decision below, debtors will face yet another risk—that any funds held by the terminated trustee under the failed Chapter 13 plan will nonetheless be distributed to creditors even after conversion. That gratuity to creditors, with no corresponding benefit to the debtor, is a strong disincentive to attempt Chapter 13 in the first instance.

Distributing remaining Chapter 13 estate property to creditors, moreover, is inconsistent with Chapter 13's general policy. When Congress set up the modern versions of Chapters 7 and 13 in 1978, it did so in response to "the tremendous rise in the amount of credit outstanding for personal, family, or household purposes." H.R. Rep. No. 95-595, at 116. As the House Report explained:

> Often, these consumers are able to keep up with their obligations in normal times, but have saved very little for emergencies or unexpected events. When a family member takes seriously ill or when the breadwinner is laid off from his job, a financial crisis ensues. In many cases, a young family of two, both working, incur a large amount of debt. If the wife stops working because of pregnancy, the family loses nearly half of its income, and has an extra member to feed and shelter. The family will go deeper and deeper into debt to support themselves, until finally the roof falls in.

Ibid. Before 1978, the "overly stringent and formalized" existing law created disincentives for debtors trying to work out a repayment plan, and even when debtors attempted such plans, the plans sometimes became "the closest thing there is to indentured servitude." *Id.* at 117.

The purpose of Chapter 13 was to bring relief to these consumer debtors. H.R. Rep. No. 95-595, at 117. The decision below, however, applied a creditor-friendly rule that gives creditors a windfall beyond the extra funds they already receive when a debtor tries, but fails, to complete a Chapter 13 plan.

D. Contrary Policy Arguments Are Unavailing

The Fifth Circuit urged that its rule "will not discourage any individuals from proceeding in Chapter 13, since it simply requires them to fully honor their obligation under a confirmed plan." Pet. App. 24a. Not so. The relevant inquiry looks at a debtor's incentives *before* the date of petition, not after a plan is confirmed. Under the proper rule, a bankruptcy attorney advising a client considering Chapter 13 bankruptcy could say: "If it does not work out, *anything not already out the door to creditors goes back to you.*" Under the Fifth Circuit's rule, however, the attorney would advise: "If it does not work out, *anything you've already handed over to the trustee gets paid to creditors anyway.*" Chapter 13 is plainly less attractive under the Fifth Circuit's rule.

Moreover, the Fifth Circuit's invocation of debtors "fully honor[ing] their obligation" under the Chapter 13 plan is inconsistent with Congress's choice to allow debtors to convert a Chapter 13 case to a Chapter 7 case "at any time." 11 U.S.C. §1307(a). When a debtor converts, he is electing to *trade* his obligations under the Chapter 13 plan for different obligations under Chapter 7. The Chapter 13 plan thus no longer obligates the debtor. That is a choice Congress allowed when it permitted debtors to convert to Chapter 7 at any time. That choice should be respected.

The Fifth Circuit also worried that, "'if the undistributed funds revert to [the debtor], instead of being dis-

tributed to creditors in accordance with the plan's terms, [the debtor] would receive a windfall.'" Pet. App. 24a-25a. But that assumes creditors have greater entitlement to the funds. Under the Bankruptcy Code, creditors have no entitlement to recover beyond what they could under Chapter 7. Congress could have chosen to require debtors to proceed through Chapter 13 before Chapter 7. But it did not, citing the "policy grounds" that "[a]n unwilling debtor is less likely to retain his job or to cooperate in the repayment plan." H.R. Rep. No. 95-595, at 120.

Because only Chapter 7 (and Chapter 11) cases can be filed involuntarily, see 11 U.S.C. §303(a), any additional recovery that accrues to creditors by virtue of Chapter 13 does so only because of the voluntary choices of debtors. In other words, debtors can choose to repay more of their debt, for mutually beneficial reasons, but they have no obligation under the Bankruptcy Code to do so. Creditors have no entitlement to a recovery that debtors can choose to pay or not. Nor does such an entitlement arise once a debtor chooses to pursue repayment under Chapter 13, because the debtor has the right to convert to Chapter 7 at any time. It is not a windfall to the debtor to be able to retain a sum he never would have had to pay to creditors had he elected to file under Chapter 7 initially, without first trying to pay under Chapter 13.

The Fifth Circuit also expressed concern about allowing a debtor to use a well-timed conversion to deprive creditors of the depreciation value of the collateral property during the pendency of the Chapter 13 proceeding and then "snatch away" undistributed money intended for those creditors. Pet. App. 27a-28a. But that makes no sense. No one disputes that a debtor may permissibly convert immediately before his monthly deduction is

submitted to the trustee. That is a much more effective way to "snatch away" funds from creditors than converting between submission to the trustee and distribution by the trustee (over which the debtor has little control). And the result is the same from creditors' perspective.

Finally, it bears mentioning that every creditor in this case received all of the money it expected to receive, right up to the date of conversion. As in *Michael*, 699 F.3d at 307, the undistributed funds here were originally earmarked for a creditor that obtained relief by other means (namely, foreclosure). Because Harris continued to make his full plan payments, but neither the trustee nor any creditor sought to modify the plan to reallocate the freed-up funds to other creditors, see 11 U.S.C. § 1329(a)(1), the extra money accumulated in the trustee's hands. The rest of the money nevertheless continued to be paid out as provided by the plan until the time of conversion, which is all that other creditors could have expected when the plan was confirmed. Returning the undistributed funds to Harris—or other debtors in his position—thus will not unfairly shortchange any creditor.

CONCLUSION

The Fifth Circuit's judgment should be reversed.

Respectfully submitted.

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